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No. 99-1240

IN THE

Supreme Court of the United States

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AND THE ALABAMA DEPARTMENT OF YOUTH SERVICES,
Petitioners,

v.

PATRICIA GARRETT AND MILTON ASH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* SELF-ADVOCATES BECOMING EMPOWERED, PEOPLE FIRST OF ALABAMA, PEOPLE FIRST OF CONNECTICUT, PEOPLE FIRST OF GEORGIA, MASS. ADVOCATES STANDING STRONG, PEOPLE FIRST OF OHIO, SPEAKING FOR OURSELVES OF PA., PEOPLE FIRST OF TENNESSEE, PEOPLE FIRST OF DANE COUNTY AND WISCONSIN, THE AUTISM NATIONAL COMMITTEE, THE CENTER FOR LAW AND EDUCATION AND TASH, IN SUPPORT OF RESPONDENTS

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LEGISLATIVE MATERIALS

Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988, Before the Subcomm. on Select Educ., House Educ. and Labor Comm., 100th Cong., 2d Sess. 10 (1988) 19
Hearings Before the Subcomm. on the Handicapped, Sen. Labor and Human Resources Comm., and the Subcomm. on Select Educ., House Educ. and Labor Comm., 100th Cong., 2nd Sess. 15 (1988) 11
Hearings on H.R. 2273 Before the House Subcomm. on Select Educ. of the Educ. and Labor Comm., 101st Cong., 1st Sess. 10 (1989) 19
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2 Recall 1949 Radiation Tests on Them, N.Y. Times at A14 (Jan. 14, 1994) 6

Baller et al., *Mid-Life Attainment of the Mentally Retarded: A Longitudinal Study*, 75 Genetic Psychol. Monographs 235 (1967) 15
D. Braddock et al., *The State of the States in Developmental Disabilities: 2000 Study Summary* (2000) 13
A. Chase, *The Legacy of Malthus* (1980) 10, 29
J. Conroy et al., *The Pennhurst Longitudinal Study* (1985) 15
C. Davenport, *Heredity in Relation to Eugenics* (1911) . . 29
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H. Goddard, *Mental Testing and the Immigrants*, 2 J. Delinquency 243 (1917) 28
S. Gould, *The Mismeasure of Man* (1995) 29
S. Gould, *Carrie Buck's Daughter, in Flamingo's Smile: Reflections in Natural History* (1985) 10
Government Used 16,000 in Radiation Tests, AP (Aug. 18, 1995) 7
Gutshall et al., *An Exploratory Study of the Interrelations Among Driving Ability, Driving Exposure and Socio-economic Status of Low, Average and High Intelligence Males*, 35 Exceptional Children 43 (1968) 15
S. Harlan et al., *Disability in Work Organizations: Barriers to Employment Opportunity*, Univ. at Albany, State Univ. of New York (1995) . . 15
H. Hart, *Social Problems in Alabama* (1918) 6
Karst, *The Supreme Court, 1976 Term -- Forward: Equal Citizenship under the Fourteenth Amendment*, 91 Harv. L. Rev. 1 (1977) 2
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J. E. Larson, *Sex, Race and Science: Eugenics in the Deep South* (1995) 5

National Counsel on the Handicapped, *Toward Independence* (1986) 17
National Counsel on the Handicapped, *On the Threshold of Independence* (1988) 17, 18
S. Noll, *Feeble-Minded in Our Midst* 90 (1995) 29
Note, A Sterilization Law for Kentucky, 23 Ky. L.J. 168 (1934) 10
Notes: The Right of the Mentally Disabled to Marry: A Statutory Evaluation, 15 J. Fam. L. 463 (1976-77) 10
S. Selden, *Inheriting Shame: The Story of Racism and Eugenics* (1999) 7, 13, 29
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The Menace of the Feebleminded in Connecticut (1915) 29
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Trustees of the Mass. Sch. for the Feeble-Minded at Waltham, Report of the Trustees of the Mass. Sch. for the Feeble-Minded at Waltham for the Year Ending Nov. 30, 1908 (1909) .. 6
U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Abilities* (1983) 4, 17, 18
U.S. Dept. of Educ., *Twenty-First Annual Report to the Congress on the Implementation of the Individuals with Disabilities Education Act (IDEA)* (1999) 14
U.S. Dept. of Energy, *Report of the Advisory Comm. on Human Radiation Experiments* (1995) 6
N. Vogel, *Retarded, Autistic Home Failed to Prevent Death*, L.A. Times (July 17, 2000) 14

L. Weicker, Jr., *Historical Backgrounds of the Americans with Disabilities Act*, 64 Temple L. Rev. 387 (1991) 18

INTEREST OF AMICI

Amici are grass-roots organizations of Americans with developmental disabilities, their families, friends, and professionals in the disability field.[1] *Amici* Self-Advocates Becoming Empowered and its affiliate "People First" organizations are directed by people with disabilities, many of whom were once segregated in large state institutions. Because of the Americans with Disabilities Act, many now live in integrated community settings. People First claim more than 900 chapters in 46 states, with 20,000 active members. *Amici* the Autism National Committee, the Center for Law and Education and TASH -- Disability Advocacy Worldwide also share a commitment to the principle that public services, supports and special education must allow people with disabilities to be independent and self-sufficient. For *amici,* the Americans with Disabilities Act has been a doorway to freedom, opportunity, and equal protection and citizenship under law.

Amici have participated in numerous cases that have raised substantive claims of constitutional violations, many of which were subsequently decided on statutory grounds. *Amici* are therefore aware of how important Congressional enactments have been to vindicating their constitutional rights. They respectfully submit this brief to share with the Court the history of state-sponsored discrimination they have experienced as well as the importance of national anti-discrimination laws in protecting their constitutional rights.

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[1] The parties have consented to the filing of this brief. No counsel for a party has authored this brief, in whole or in part, and no person other than *amici* and their counsel has made any monetary contribution for its preparation.

SUMMARY OF ARGUMENT

Congress enacted the Americans with Disabilities Act to remedy a century of state-sponsored, invidious, and unconstitutional discrimination against people with disabilities. For a century, every state acted to segregate, isolate, and eliminate people with disabilities from the community. State laws and policies segregated people with disabilities in institutions, barred them from public schools, prohibited them from marrying and mandated their sterilization. This pervasive state action denied and continues to deny people with disabilities equal protection and citizenship by excluding them from "everyday life activities, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999).

The Americans with Disabilities Act is a measured and proportionate national remedy for this historical regime of state-mandated discrimination. The Act upholds and enforces "the principle of equal citizenship ... [that] presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a non-participant." Karst, *The Supreme Court, 1976 Term -- Forward: Equal Citizenship under the Fourteenth Amendment*, 91 Harv. L. Rev. 1, 6 (1977).

Amici further submit that this Court should affirm that disability-based classifications are subject to heightened scrutiny review. Such review is justified by the purposeful unequal treatment people with disabilities have faced at the hands of the states, treatment that parallels race, gender and ethnic-based discrimination, and would clarify and fulfill the "searching review" the Court employed in *City of*

Cleburne v. Cleburne Living Center, 473 U.S. 432, 457 (1985), to strike down a discriminatory zoning ordinance.

ARGUMENT

I. TITLE II OF THE AMERICANS WITH DISABILITIES ACT IS A REMEDIAL MEASURE THAT IS CONGRUENT AND PROPORTIONAL TO THE LONG, TRAGIC, AND ONGOING HISTORY OF UNCONSTITUTIONAL, STATE-SPONSORED DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES.

A. For Over a Century, the States Have Unconstitutionally Segregated and Isolated People with Disabilities.

For over one hundred years, every State acted purposefully and deliberately to segregate and isolate people with disabilities from community and family, in violation of the Fourteenth Amendment. This regime of state mandated, unconstitutional discrimination arose from irrational prejudice, fear and stereotype and has been described by five members of the U.S. Supreme Court as "grotesque." *Cleburne*, 473 U.S. at 454, 461. By force of law and official action, the States rendered the guarantee of equal citizenship a dead letter for people with disabilities. When set against this stark background, the Americans with Disabilities Act is a measured and appropriate remedy for these widespread, systematic constitutional transgressions.[2]

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[2] Unlike age-based classifications addressed in *Kimel v. Florida Bd. of Regents*, ___ U.S. ___, 120 S.Ct. 631, 646-47 (2000), which the Court has never found unconstitutional, the Court has repeatedly found that states have violated the constitutional rights of people with disabilities. *Cleburne, supra; Youngberg v. Romeo*, 457 U.S. 307

Beginning in the 1870s, state legislatures enacted numerous laws to remove "imbeciles," "idiots," and "the feeble-minded" from society. These efforts were not benign. State officials branded people with disabilities as "the underlying source of nearly all social problems," including "pauperism, degeneracy and crime," and constructed massive public institutions to segregate people with disabilities from society. U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Abilities* 19-20 (1983). Such discrimination was not limited to severe disabilities. "To isolate handicapped people, some professionals advocated institutionalization for even minor disabling conditions." *Id.* The breadth of such state-enforced exclusion is astonishing:

> Whether young or old; whether borderline or profoundly retarded; whether physically handicapped or physically sound; whether deaf or blind; whether rural or urban; whether from the local town or from 500 miles away; whether well-behaved or ill-behaved[,][w]e took them all, by the thousands, 5,000 to 6,000 in some institutions.

Id. at 20-21 (*quoting* W. Wolfensberger, *The Origins of Our Institutional Models, in* President's Comm. on Mental Retardation, *Changing Patterns in Residential Servs. for the Mentally Retarded* 143 (1969)).

Every state enacted laws forcing the lifetime institutionalization of people with disabilities.[3] In 1919, Alabama established "The Alabama Home" for "[a]ll persons of whatever age who are deficient or inferior, ...

(1982); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *cf. Meyer v. Nebraska*, 262 U.S. 390 (1923).

[3] A "Compendium of Purposeful State Action" is attached as Appendix A to this brief and was submitted by *Amici* in *Cleburne*.

idiots, imbeciles, feeble-minded or morons, and ... epileptics ..." 1919 Ala. Acts 738, No. 568, § 2, 7-8. A brochure touting the institution warned of the "feeble-minded":

> They do not work. They are immoral. They commit crimes. They multiply like rabbits, and their children are feeble-minded. This institutional care and training of the feeble-minded (1) Purifies human stock, and (2) reduces taxes.

An Institution for the Feeble-Minded of Alabama (1918), *in* E. Larson, *Sex, Race and Science: Eugenics in the Deep South* 81 (1995).[4]

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[4] In stating that "Alabama has a long history of providing support, rehabilitation and protection for individuals with disabilities," Pet. Br. at 7, Petitioners ignore the conditions imposed on people with disabilities in Alabama's state institutions. In *Wyatt v. Stickney*, 334 F. Supp. 1341 (M.D. Ala. 1971), the district court described such conditions at Alabama's Bryce Hospital:

> [T]he dormitories are barn-like structures with no privacy for the patients. For most patients there is not even a space provided where he can think of as his own. The toilets in restrooms seldom have partitions between them. These are dehumanizing factors which degenerate the patients' self-esteem. Also contributing to the poor psychological environment are the shoddy wearing apparel furnished the patients, the non-therapeutic work assigned to patients (mostly compulsory, uncompensated housekeeping chores), and the degrading and humiliating admissions procedure which creates in the patient an impression of the hospital as a prison or a "crazy house" ... Only fifty cents per patient per day is spent for food ...

Id. at 1343. Alabama's institutions continue to impose unconstitutional conditions on people with disabilities. In 1995, a federal court found that Alabama's Eufaula Adolescent Center, an institution for children with disabilities, was so substandard, dangerous, and lacking in treatment that it "was essentially a penal institution." *Wyatt v. Poundstone*, 892 F. Supp. 1410, 1413 (M.D.Ala. 1995). Additionally, "most of the children did not belong in the Center's restrictive

Such actions were not confined to Alabama, or even the South. The segregation, and outright elimination of people with disabilities was a national phenomenon.[5] In 1887 California became the first state to provide for the segregation "for life" of "imbecile or feeble-minded" people. 1887 Cal. Stats. 69 ch. 57 (1887). Massachusetts State Superintendent Dr. Walter Fernald reported in 1908 that "there is an urgent need for the commitment and permanent detention of the higher grade cases of deficit [that are the] most undesirable and troublesome members of society." *Report of the Trustees of the Mass. Sch. for the Feeble-Minded at Waltham for the Year Ending Nov. 30, 1908* 22-23 (1909).[6]

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environment." *Id; see also Wyatt v. Rogers*, 985 F. Supp. 1356, 1404 (M.D. Ala. 1997)(finding "significant violations of individual liberties remain" in other state institutions).

[5] A 1918 Alabama survey called people with disabilities "her most worthless and hopeless citizens," and Governor Charles Henderson declared to Alabama citizens that the institutions were "to protect you from the evils of vice, crime, disease and pauperism." *Social Problems in Alabama* 8, 10 (1918).

[6] As late as the 1970s, with the full authority and cooperation of the states, America's most prestigious universities and scientists used institutionalized children and adults with disabilities as subjects in harmful experiments. In one infamous example, conducted between 1946 and the early 1950s, Massachusetts' Fernald State School fed radioactive isotopes to children with retardation as part of Massachusetts Institute of Technology studies on the effects of radiation in humans. The institution mixed the isotopes with the children's breakfast oatmeal. In studies in the early 1960s, radioactive iodine was fed to children at Fernald and the Wrentham State School, another Massachusetts institution. *U.S. Dep't of Energy, Report of the Advisory Comm. on Human Radiation Experiments* ch. 7 (1995). The federal researcher overseeing the experiments warned that they could be compared to Nazi experiments on concentration camp prisoners. 2 *Recall 1949 Radiation Tests on Them*, N.Y. Times at A14 (Jan. 14,

Driving the states' efforts to ensure that people with disabilities lived "shunted aside, hidden, and ignored," *Alexander v. Choate*, 469 U.S. 287, 296 (1985), was the rise of the eugenics movement in the late 19th and early 20th centuries. Eugenicists believed that heredity "was of single importance in predicting human performance and it must play a key role in policies and programs for human betterment." S. Selden, *Inheriting Shame: The Story of Racism and Eugenics in America* xiv (1999).

There is no better description of the derivation of state policy from eugenics than Justice Thurgood Marshall's concurring opinion in *Cleburne*. Describing the "lengthy and tragic history that can only be called grotesque," Justice Marshall wrote:

> Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feeble-minded" as "a menace to

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1994). In the early 1960s, the Arkansas Children's Colony injected children with retardation as young as 13 with iodine-131 as part of a thyroid study. *Government Used 16,000 in Radiation Tests*, AP (Aug. 18, 1995). Another case involved the hepatitis studies of Dr. Saul Krugman of New York University. From 1956 to 1972, the Willowbrook State School in New York allowed Dr. Krugman's staff to "systematically infect[] newly arrived children with strains of the [hepatitis B] virus." *Advisory Comm. Report* ch. 7.

These experiments had discriminatory effects on their human subjects with disabilities lasting well beyond the study period. In 1978 and 1979, the New York City public schools ordered the exclusion of Willowbrook children from public school due to their exposure to hepatitis. *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644, 647 (2d Cir. 1979)(holding that no rational basis existed for excluding such children from public school). The Department of Energy concluded in 1995 that "there are still no federal regulations protecting institutionalized children from unfair treatment in research involving human subjects." *Advisory Comm. Report* ch. 7.

> society and civilization ... responsible in a large degree for many, if not all, of our social problems. A regime of *state-mandated* segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race."

473 U.S. at 461-62 (footnotes omitted)(emphasis added).

Inexorably linked with institutionalization and degraded citizenship is the state-mandated segregation and exclusion of children with disabilities from public schools. *Cf. Plyler v. Doe*, 457 U.S. 202, 222-23 (1982). The "wide-spread practice of relegating handicapped children to ... institutions or warehousing them in special classes," *School Comm. of Burlington v. Mass. Dept. of Educ.*, 471 U.S. 359, 373 (1985), was by force of state law.[7] School superintendents urged that children with disabilities were "ineducable" and would never "fit in" to American society.[8] States relegated these children into isolated "state

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[7] *See e.g.* 1976 Cal. Stat. ch. 1010, 3561 (excluding children whose "physical or mental disability" is "inimical to the welfare of other pupils"); 1963 Colo. Sess. Laws ch. 243, 864 (same); 1888 Conn. Pub. Acts tit. 13 § 489 (committing "indigent imbecile children" to "School for Imbeciles at Lakeville"); Nev. Rev. Laws § 1702 (1912)(authorizing education of "deaf and dumb and the blind" only in California and Utah institutions); 1928 N.Y. Laws § 23-624 ("feebleminded" who are "unable to benefit from instruction, shall not be permitted to attend"); 1919 N.Y. Laws ch. 382 (establishing Rome asylum for "unteachable idiots"); 1903 N.D. Laws § 84-759 ("any ... feeble minded child" must attend "institution at Grafton"); 24 Pa. Stat. Ann. § 13-375 (1971)(excluding "children who are found to be uneducable and untrainable").

[8] In *State ex rel. Beattie v. Board of Educ.*, 169 Wis. 231 (1919), the Wisconsin Supreme Court upheld the exclusion of a child with

schools" that were euphemisms for institutions. Many children would spend their entire lives in such facilities. Children with retardation were excluded categorically, in violation of the Fourteenth Amendment. *See Pennsylvania Ass'n for Retarded Children v. Pennsylvania,* 334 F. Supp.1257 (E.D. Pa. 1971), 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.D.C. 1972). By 1975, Congress estimated that "one million of the handicapped children in the United States are excluded entirely from the public school system". Education for All Handicapped Children Act, 20 U.S.C. fmr. § 1400(b)(4).

States acted by law to stop the procreation of people with retardation and other disabilities, with an eye toward their eventual elimination. The Court embraced, endorsed and propelled such invidious attitudes in *Buck v. Bell,* 274 U.S. 200 (1927), when it upheld the involuntary sterilization of Carrie Buck, an institutionalized Virginia woman with retardation:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence ... Three generations of imbeciles are enough.[9]

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cerebral palsy from public school due to his "uncontrollable flow of saliva," his "physical condition and ailment [that] produces a depressing and nauseating effect upon the teachers and school children". *Id.* In *Watson v. City of Cambridge*, 157 Mass. 561 (1893), the Massachusetts Supreme Judicial Court upheld a child's exclusion because he made "uncouth noises" and was "unable to take the ordinary decent physical care of himself." *Id.*

[9] *See also* 1919 Ala. Acts 739 § 13 (authorizing sterilization of Alabama Home "inmates"); S. Gould, *Carrie Buck's Daughter, in*

Id. State laws also prohibited people with disabilities from entering the state[10] and criminalized marriage of "idiots", the "insane", and the "feeble-minded." Many such laws were in effect until recently, and many remain in effect today.[11]

Flamingo's Smile: Reflections in Natural History (1985). A 1934 Kentucky Law Review article proudly states that "[t]he United States was the pioneer in the movement for sterilization, and today is considered the foremost champion and advocate of that cause in the world." *Note, A Sterilization Statute for Kentucky*, 23 Ky. L.J. 168, 169 (1934)). Nazi sterilization laws were "taken almost *in toto* from ... [the] Model [State] Eugenical Sterilization Law." A. Chase, *The Legacy of Malthus* 133-35 (1980).

[10] *See e.g.* 44 Ala. Code §§ 19-20 (1940); Fla. Comp. Gen. Laws § 8003 (1927); Ga. Code Ann. § 23-2005 (1935); Kan. Stats. Ann. § 39-339 (Corrick 1935)("person likely to become [public] charge"); 33 Me. Rev. Stats. § 43; Minn. Stats. §§ 3163, 3173 (Mason's 1927)("insane", "idiotic"); Miss. Code Ann. § 5715 (1930); Nev. Comp. Laws § 5147 (Hillyer 1927); S.D. Code § 50.0106 (1939)("person likely to become public charge"); 15 Vt. Pub. Laws ch. 160, § 3949 (1933)(same); Wyo. Stats. Ann. §§ 29-1206a, 29-1205b (Courtright 1931)("persons likely to become [a] charge for disability").

[11] For example, it is currently a crime in Mississippi to issue a marriage license to anyone who is "insane or an imbecile." Miss. Code Ann. § 93-1-5(f)(2000). *See e.g.* Cal. Civ. Code § 4201 (1994); Conn. Gen. Stat. § 46-2 (1999); D.C. Code Ann. § 30-103(1)(2000); Haw. Rev. Stat. § 580-21 (1976); 89 Ill. Comp. Stat. § 6 (1976); Ind. Code § 31-1-1-2 (1973); Ia. Code Ann. § 595.3 (1976); Kan. Stat. Ann. § 23-120 (1977); Ky. Rev. Stat. Ann. § 402.020(1)(1971); Me. Rev. Stat. Ann. tit. 19, § 32 (1964); Mich. Stat. Ann. § 25.6 (1999); Mo. Rev. Stat. § 451.020 (1983); Neb. Rev. Stat. § 42-103 (1974); N.J. Stat. Ann. § 37:1-9 (1969); N.C. Gen. Stat. § 51-12 (1985)(sterilization required for marriage); N.D. Cent. Code § 14-03-17 (1971); N.Y. Dom. Rel. Law § 140(3)(2000); Ohio Rev. Code Ann. § 3101.06 (1975); 48 Pa. Stat. Ann. § 1-5(d)(1997); R.I. Gen. Laws § 15-1-5 (1970); Tenn. Code Ann. § 36-3-109 (1999); 15 Vt. Stat. Ann. § 512 (2000); V.I. Code Ann. tit. 16, § 2(1)(2000); Va. Code Ann. § 20-46(4)(1985); Wash. Rev. Code Ann. § 26.04.030 (1976); W. Va.

B. The Regime of State-Mandated Discrimination Continues to Deny Equal Citizenship to People with Disabilities.

Petitioners assert that because of changed attitudes, people with disabilities no longer face significant discrimination or barriers to their full involvement in society. The sheer weight of the historical record of discrimination alone betrays the falsity of this argument. While attitudes toward disability, like race and gender, have improved in recent years, the effects of a century of invidious discrimination, propelled by the power of every State, still figure significantly in state policy and actions toward people with disabilities. The state-mandated segregation that caused the near-total lack of access of people with disabilities in society cannot be dismissed as a relic of the past.[12]

The discriminatory infrastructure of separate institutions and schools the states created is still present in America and spawns a vicious circle of exclusion from other facets of life, including work, education, and transportation. As sponsoring Representative Tony Coehlo noted in a joint Congressional hearing on the Act:

> When housing is inaccessible and unavailable, the disabled have to stay at home, under the care of their families, or live in nursing homes and other

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Code Ann. § 48-2-2(a) (2000); Wyo. Stat. Ann. § 20-32 (1959). *See also Notes: The Right of the Mentally Disabled to Marry: A Statutory Evaluation*, 15 J. Fam. L. 463 (1976-77).

[12] *Cf. Allen v. Wright*, 468 U.S. 737, 755 (1984)("There can be no doubt that [stigmatizing injury] is one of the most serious consequences of discriminatory government action.")

> institutions, rather than establishing and controlling their own households next door to you and me. When regular transportation is inaccessible, and transit services for the disabled are segregated, you won't see them on your bus or commuter train. When prejudice dictates that the handicapped can be productively employed only in separate sheltered workshops, you won't see too many of them in your workplace. ... We must stop the cycle of separateness which hides people with disabilities, and creates prejudice, which creates more separateness.

Hearings before the Subcomm. on the Handicapped, Sen. Labor and Human Resources Comm., and the Subcomm. on Select Educ., House Educ. and Labor Comm., 100th Cong., 2nd Sess. 15 (1988).

Justice Marshall wrote in *Cleburne* that "[p]rejudice, once let loose, is not easily cabined." 473 U.S. at 464. He continued, "[M]ost important, lengthy and continuing isolation of the retarded has perpetuated the ignorance, irrational fears, and stereotyping that long have plagued them." *Id.* Last term, the Court heard arguments on whether a state had the right to segregate two women with retardation even when the women could live and were living in the community. The Court held that the unnecessary segregation of people with disabilities "who can handle and benefit from community settings *perpetuates unwarranted assumptions* that persons so isolated are incapable or unworthy of participating in community life." *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999)(emphasis added).[13]

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[13] The statutes the seven state *amici* cite for Petitioners as proof that state-sponsored discrimination never existed or has been eradicated *do not* address, let alone rectify, the legacy of unnecessary segregation and institutionalization that Title II seeks to remedy. Indeed, Alabama continues to "perpetuate unwarranted assumptions" by having the

Yet many of the institutions created to segregate the "feeble-minded" operate today.[14] *See Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985)(official policy, originally motivated by discrimination, continues to have discriminatory effect regardless of current official attitudes). As of 1998, states housed nearly 125,000 Americans with developmental disabilities in such facilities. D. Braddock et al., *The State of the States in Developmental Disabilities: 2000 Study Summary* (2000). These state institutions have been found to segregate unnecessarily thousands of people with disabilities, in violation of the Fourteenth Amendment. *Thomas S. v. Flaherty*, 699 F. Supp. 1178, 1191 (W.D.N.C. 1988), *aff'd*, 902 F.2d 250 (4th Cir.), *cert. denied*, 498 U.S. 951 (1990); *Clark v. Cohen*, 794 F.2d 79, 83 (3rd Cir.), *cert. denied*, 479 U.S. 962 (1986); *Savidge v. Fincannon*, 836 F.2d 898, 906 (5th Cir. 1988); *cf. S.H. v. Edwards*, 886 F.2d 292, 293 (11th Cir. 1989).[15] These institutions have

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second-highest rate of institutionalization in the nation. D. Braddock et al., *The State of the States in Developmental Disabilities* 93 (1998).

[14] The continuing vitality of negative stereotypes toward disability, expressed *inter alia* in the continued operation of segregated institutions, reflects that the "eugenics message of selective breeding and racial betterment [became] an integral part of high school and college biology texts in the 1920s, 1930s, and 1940s" and "were ideas taught to young people in our schools and to the parents at state fairs and in popular magazines." S. Selden, *Inheriting Shame: The Story of Eugenics and Racism in Ameica* xi (1999). "[T]he dead hand of the past continue[s] to guide the practices of the present as well as of the future." *Id.* at vii.

[15] *See Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923)(the historical practice of "'putting away ... the offspring of the inferior, or of the better when they chance to be deformed'" would "do ... violence to both the letter and spirit of the Constitution.")(*quoting Plato's Ideal Commonwealth*).

also been found to lack treatment or habilitation and are often squalid and dangerous, as Alabama's example starkly shows. See *supra* note 4.[16]

States continue to exclude students with disabilities from regular classes and schools. In 1996-97, over twenty years after the passage of the Education for All Handicapped Children Act, 89.5 percent of American children with retardation are excluded from regular classrooms for over 80 percent of the school day; in Alabama, the figure is 96.31 percent. For children classified as having solely orthopedic impairments — not cognitive disabilities, but physical disabilities — 58.46 percent remain excluded from regular class nationwide; in Alabama one in two were so excluded.[17] U.S. Dep't of Educ., *Twenty-First Annual Report to Congress on the Implementation of the Individuals with Disabilities*

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[16] Alabama is not the only state that continues to impose unconstitutional conditions on institutionalized people with disabilities. *See Jackson v. Fort Stanton Hosp. & Training Sch.*, 757 F. Supp. 1243 (D.N.M. 1990), *rev'd in part on other grounds*, 964 F.2d 980 (10th Cir. 1992); *New York State Ass'n for Retarded Children v. Carey*, 551 F. Supp. 1165, 1170-78 (E.D.N.Y. 1982)(describing filthy, unsanitary and unhealthy conditions, inadequate treatment, and understaffing at multiple New York state institutions); *Lelsz v. Kavanagh*, 673 F. Supp. 828, 860-61 (N.D. Tex. 1987)(inadequate medical care, lack of safety, misuse of restraints, and lack of habilitation services all violated constitutional rights of residents of Texas state institution); *see also* Nancy Vogel, *Retarded, Autistic Home Failed to Prevent Death*, L.A. Times (Jul. 17, 2000)(reporting egregious conditions at California's Sonoma institution, the nation's first and largest).

[17] *See also* J. Landau, *Out of the Mainstream: Education of Disabled Youth in Massachusetts* (1987)(from 1974 to 1985, segregation of students with disabilities increased 243 percent).

Education Act (IDEA)(1999).[18] State-sponsored discrimination additionally remains in employment[19] and zoning.[20] The historical regime of state-mandated discrimination has not been dismantled and remains an ever-present barrier to equal citizenship for Americans with disabilities.[21]

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[18] Such segregation is emphatically not because children with retardation cannot be included in regular classes. In 1996-97, Vermont included 72.71 percent of its students with retardation and 87.1 percent of students with orthopedic disabilities in regular classes. *Id.*

[19] A 1995 study of New York State employees in four agencies, including the Office of Mental Retardation and Developmental Disabilities, found that people with disabilities were systemically excluded from state employment. S. Harlan et al., *Disability in Work Organizations: Barriers to Employment Opportunity*, Univ. at Albany, State Univ. of New York (1995). Significantly, the study found little difference between the public and private sector. "The State is first and foremost a large employer that has much in common with other large businesses in its bureaucratic organization of the work force." *Id.* at 156.

[20] State laws and official conduct that the *Cleburne* Court found unconstitutional persist today and require judicial remedies. *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1500 (10th Cir. 1995)(reviewing Utah state law which "facially single[s] out the handicapped and appl[ies] different rules to them"); *Marbrunak v. City of Stow*, 974 F.3d 43, 47-8 (6th Cir. 1992)(striking differential safety requirements for home for retarded); *Arc of New Jersey v. New Jersey*, 950 F. Supp. 637, 645 (D.N.J. 1996)(striking down state law setting "permanent quotas on the number of developmentally disabled or mentally ill individuals who may live" in a community).

[21] The irrationality of these state actions is exemplified by the extensive empirical literature showing the competency of people with disabilities. *See e.g.* J. Conroy et al., *The Pennhurst Longitudinal Study* (1985)(success of formerly institutionalized people with disabilities in community); Baller et al., *Mid-Life Attainment of the Mentally Retarded: A Longitudinal Study*, 75 Genetic Psychol. Monographs 235, 255-65, 310 (1967)(marriage, voting); Gutshall et

C. Through the Act, Congress Sought to Remedy and Deter Equal Protection Violations and Enforce the Guarantee of Equal Citizenship.

When Congress enacted the Americans with Disabilities Act, it clearly and unambiguously sought to reverse the century of irrational, unconstitutional discrimination established and enforced by authority of every state. A bipartisan Congressional majority recognized the legacy of irrational prejudice and fear that has forced Americans with disabilities to live under discriminatory conditions,[22] and set forth to make the guarantees of the Equal Protection and Equal Citizenship Clauses a reality for people with disabilities.

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al., *An Exploratory Study of the Interrelations Among Driving Ability, Driving Exposure and Socio-economic Status of Low, Average, and High Intelligence Males*, 35 Exceptional Children 43-7 (1968)(driving).

[22] *See* S. Rep. No. 116, 101st Cong., 1st Sess. 8 (1989)("Our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right."); *see e.g.* 136 Cong. Rec. H2449 (May 17, 1990)(statement of Rep. AuCoin)(persons with disabilities subjected to "myths, stereotypes and irrational fears"); 135 Cong. Rec. S4986 (May 9, 1989)(statement of Sen. Harkin)(people with disabilities subjected to "false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies"); *Hearings on H.R.. 2273 and S. 933 Before the Subcomm. on Transportation and Hazardous Materials of the Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 1 (1989)(statement of Rep. Luken)("Discrimination, whether produced by overt actions or thoughtless attitudes, produces segregation, exclusion, impoverishment, and denial of equal and meaningful opportunities.").

The movement to enact a civil rights statute for people with disabilities began in 1982 with President Reagan's call to free people with disabilities from official discrimination and exclusion:

> Our Nation's commitment to *equal protection of the laws* will have little meaning if we deny such protection to those who have not been blessed with the same physical or mental gifts we too often take for granted. I support Federal laws prohibiting discrimination against the handicapped, and remain determined that such laws be vigorously enforced.

National Council on the Handicapped, *On the Threshold of Independence* 19 (1988)(emphasis added). Responding to the President's declaration, the United States Civil Rights Commission in 1983 issued *Accommodating the Spectrum of Individual Abilities*. The report, which Congress adopted into the record of the Disabilities Act, documented the equal protection violations people with disabilities suffered, including the state-sponsored discrimination arising from the "eugenics" movement.[23] Following the Commission's

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[23] The Civil Rights Commission found:

> The harshest side of institutionalization is the systematic placement of handicapped people in substandard residential facilities, where incidents of abuse by staff and other residents, dangerous physical conditions, gross understaffing, overuse of medication to control residents, medical experimentation, inadequate and unsanitary food, sexual abuses, use of solitary confinement and physical restraints, and other serious deficiencies and questionable practices have been reported. But even the better institutions suffer the ill effects of segregation:
>
> > Institutions serve two central purposes. First, they segregate disabled people from the community; and second, they provide convenience for administrators and instructional personnel because children with a given disability are concentrated together and readily accessible. As instruments of segregation, institutions are undeniably effective . ... As settings for individual growth and

report, the National Council on the Handicapped in 1986 issued *Toward Independence,* which found that "[b]illions of *public dollars* are currently spent on maintaining millions of disabled Americans in situations of unproductive dependency, which impose artificial limits on disabled individuals' potential to become contributing members of society." *Toward Independence* at G-1 (emphasis added). The report recommended a comprehensive civil rights statute for people with disabilities.

Toward Independence and its 1988 successor, *On the Threshold of Independence,* also became a part of the Congressional record and served as the forerunner to the Act itself. Lowell P. Weicker, Jr., *Historical Background of the Americans with Disabilities Act*, 64 Temple L. Rev. 387, 391 (1991).[24] Building on these three comprehensive reports, Congress developed over two years hearings and testimony documenting the history of equal protection violations against people with disabilities. Former sponsor Senator Weicker described the state-mandated discrimination that the Act was designed to remedy:

> For years, this country has maintained a *public policy* of protectionism toward people with disabilities. We have created monoliths of isolated care in institutions and in segregated educational settings. It is that

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> development, however, institutions may be the worst possible arrangement.

Accommodating the Spectrum of Abilities 33 (*quoting* F. Bowe, *Handicapping America: Barriers to Disabled People* 143-44 (1978)).

[24] President Reagan responded, "I agree with the goals in *Toward Independence -- equal opportunity and full social participation* for all Americans". He added, "The road toward full independence will not be easy." Letter from President Ronald Reagan to the Hon. Sandra S. Perrino, Chairperson, National Council on the Handicapped (Jan. 29, 1986), *in On the Threshold of Independence* 5 (emphasis added).

> isolation and segregation that has become the basis of the discrimination faced by many disabled people today. Separate is not equal. It was not for black; it is not for disabled.

Hearings on S. 933 Before the Comm. on Labor and Human Resources and the Subcomm. on the Handicapped, 101st Cong., 1st Sess. 215 (1989)(emphasis added). James Ellis, the President of the American Association on Mental Retardation, testified similarly:

> People with disabilities have been subjected to invidious discrimination throughout history. In the case of individuals who have mental retardation, the history of discrimination has been described by five members of the Supreme Court of the United States as "grotesque." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 454, 461 (1985). This discrimination has been pervasive and has reached almost every aspect of the lives of people with disabilities and has denied them the most basic and fundamental rights of American citizenship.

Hearings on H.R. 2273 Before the Subcomm. on Civil and Constitutional Rights of the Judiciary Comm., 101st Cong., 1st Sess. 418 (1989).[25] Congress intended Title II as a

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[25] *See e.g. Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988, Hearings Before the Subcomm. on Select Educ., House Educ. and Labor Comm.*, 100th Cong., 2nd Sess. (1988) at 10 (testimony of Justin Dart)("America cannot afford either the moral or economic costs of maintaining ever increasing millions of its potentially productive citizens in unjust and unwanted dependency."), 31 (testimony of Eric Griffen)("[F]orced segregation and dependency of millions of individuals with disabilities in this country constitutes a violation of their constitutional and basic human rights"), 62 (statement of Bill Knight)("[A] segregated society is created due to institutionalization."); *Hearing on H.R. 2273 Before the House Subcomm. on Select Educ. of the Educ. and Labor Comm.*, 101st Cong., 1st Sess. (1989) at 10 (testimony of Joseph Reum)("We have

remedial measure that would guarantee equal access to public services and that such services not act as the catalyst for unconstitutional segregation.

D. The Act is Proportional and Congruent to the History of Unconstitutional, State-Sponsored Discrimination Against People with Disabilities.

To determine whether a statute is a valid enforcement measure, courts must "first identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy, guided by the principle that the propriety of any §5 legislation 'must be judged with reference to the historical experience ... it reflects.'" *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639-40 (1999)(*quoting City of Boerne v. Flores*, 521 U.S. 507, 525 (1997)).

In *Cleburne*, the Court scrutinized the six proffered grounds for the zoning ordinance and rejected all because they furthered no governmental interest. Three of the six grounds were based on "vague, undifferentiated fears" (neighbors' negative attitudes; the fears of elderly residents; the possibility of harassment); two on irrational assumptions about the risks the home's location posed to the residents or others; the last on an irrational assumption that the home's size would constitute a burden. While recognizing that the retarded "suffer a disability not shared by others", the constitutional question was "why this difference warrants a ... regulation that others need not observe". 473 U.S. at

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experienced a segregation which shuts away the humanity ... We have been institutionalized, we have been sheltered, we have had our choices limited ... This legislation sets many people free who challenge the best of our society to respect the dignity and integrity of the individual.").

449-50. The Court concluded "that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded," and accordingly struck down the ordinance. *Id.* at 450.

This Court has similarly concluded that this conduct is exactly what the Act and its antecedent statute, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, address. In the first case reviewing Section 504, the Court held the statute prohibits an employer from "exclud[ing] from participation in a federally funded program 'solely by reason of his handicap,' indicating only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). Subsequently, this Court held the statute is "*carefully structured* to replace such reflexive reactions to actual and perceived handicaps with actions based upon reasoned and . . .sound judgments." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1985)(emphasis added). "[D]iscrimination on the basis of mythology [is] precisely the type of injury Congress sought to prevent." *Id.* at 285.

In *Olmstead*, this Court held the Act prohibits state conduct such as unnecessary institutionalization, that is based on or "perpetuates *unwarranted assumptions* that persons [with disabilities]. . .are incapable or unworthy of participating in community life" or that "severely diminish the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead*, 527 U.S. at 600-01. Thus, if including a person with a disability in the community is reasonable and does not fundamentally alter the state's disability services program, the state's exclusion of the person from the community is irrational and would withstand

neither the Act nor the Fourteenth Amendment. *See Olmstead*, 527 U.S. at 602.[26]

The Act is proportional because it imposes no duty except with regard to *qualified* persons with disability. Under *Title I*, undue burden and fundamental alternation modify the duty; under the public services provisions of *Title II*, only fundamental alteration obtains. H.R. Rep. 101-485(III), 101st Cong., 2nd Sess. 50 (1990). Just as Justice White did in *Cleburne*, the only way to be sure whether state action is prohibited under the Act is thoughtfully to consider whether the reasons given are factually correct and not based on myth, stereotype or ignorance. In short, the question required by the Act is whether upon analysis, the reasons dissolve to prejudice. *See Bragdon v. Abbott*, 524 U.S. 624, 650 (1998)(decisions covered by the Act must be based on "objective evidence"); *see also Olmstead*, 527 U.S. at 602.

Considering the Act's coverage and defenses, the constitutional violations that Title II prohibits are proportional if not identical to those forbidden unanimously by the Court in *Cleburne*. Petitioners dismiss *Cleburne* on "level of scrutiny" grounds while deliberately avoiding the *content* of the Court's opinion. Under *Cleburne*, it is not true that "any excuse" will suffice; rather, conduct "whose relationship to an asserted goal is so attenuated ... render[s] the distinction arbitrary or irrational." 473 U.S. at 446 (citations omitted). The Act is no different: it prohibits conduct that differentiates on the basis of, or discriminates against, disability when, after careful consideration of the

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[26] The Court has recognized that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *City of Boerne*, 521 U.S. at 518 (*quoting Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

Act's defenses, no rational justification for the conduct exists.

II. THE COURT SHOULD AFFIRM THAT DISABILITY-BASED CLASSIFICATIONS ARE SUBJECT TO HEIGHTENED SCRUTINY.

Amici submit that the Court should acknowledge and affirm the heightened scrutiny review for disability-based classifications that the Court actually applied in *Cleburne*, with five Justices saying so and all nine doing so. Certainly, this Court has never applied the "minimal scrutiny" Petitioners seek here. Moreover, if Petitioners' arguments are accepted, the Court's analysis in *Cleburne* would be invalid and stood on its head.

A. A Holding that the Act is Unenforceable Against States Would Render Invalid the *Cleburne* Court's Analysis and its Protections for People with Disabilities.

In unanimously striking down the Texas ordinance, the *Cleburne* Court acknowledged the long and invidious state-sponsored discrimination against people with disabilities, calling it "grotesque." 473 U.S. at 454, 461. As stated above, the Court conducted a "searching review" of each of the six reasons offered to justify the exclusionary statute and rejected each as bearing no relation to a legitimate governmental concern. *Id.* at 457. In so doing, the Court applied a test which Justice White called "rational basis" but which is in fact identical to heightened scrutiny review. Indeed, five Justices so found. Justice Marshall, joined by Justices Brennan and Blackmun, explicitly found the Court used "precisely that sort of probing inquiry associated with heightened scrutiny." *Id.* at 458.

Justice Stevens rejected Justice White's categorization of the *Cleburne* test as "minimal" and explicitly eschewed categories of scrutiny. Instead of the talismanic application of rigid levels of review, Justice Stevens recognized that "classifications based on ... mental retardation[] do not fit well into sharply defined classifications," *id.* at 451, and applied a simple syllogism. When the "class ... harmed by the legislation" has been "subjected to a 'tradition of disfavor' by our laws", *Id.* at 453, the Court must carefully scrutinize the proffered justification for the state action. Justice Stevens found that his standards apply to disability because persons with retarded "'have been subject to a history of unfair and often grotesque mistreatment.'" *Id.* at 454 (citation omitted). Thus, although not using the words "heightened scrutiny," Justice Stevens and Chief Justice Burger, as well as three other Justices, rejected "minimal scrutiny" and required a review identical to heightened scrutiny for the *Cleburne* zoning ordinance.

Cleburne held that disability-based classifications fall when based on "mere negative attitudes or fear" or "[p]rivate biases," 473 U.S. at 448, exactly like gender-based classifications, which the Court has long held "must be applied free of fixed notions concerning the roles and abilities of males and females." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). Under heightened scrutiny, a statutory classification fails if it "reflects archaic and stereotypic notions." *Id.* Yet if, as Petitioners urge, the congruence of these tests is ignored, "rational basis" threatens to do what the *Cleburne* Court warned should not happen: it would leave people with disabilities "unprotected from invidious discrimination." 473 U.S. at 446.[27] *Amici* submit that the semantic game of

[27] In finding that Justice White refused to name a higher level of scrutiny but applied one in practice, Justice Marshall warned that the

words should be ended: The Court must affirm that people with disabilities are a quasi-suspect class and that disability-based classifications must be reviewed with heightened scrutiny.

In recommending what he called "rational basis" review, Justice White relied significantly on existing anti-discrimination laws. He reasoned that such laws meant that persons with disabilities are not "politically powerless in the sense that they have no ability to attract the attention of the lawmakers" and exemplified a lack of "continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary." *Id.* at 445-46. The Disabilities Act would presumably rank among the laws evincing a changed attitude toward disability as well as the influence of disability organizations. Thus the inherent paradox presented here: a lower level of scrutiny threatens to render unenforceable the very laws that justified lowering the level of scrutiny.

Ignoring the analysis of all three opinions, and ignoring that nine justices were unanimous in what the Court actually did, Petitioners wield "rational basis" as a sword with which they urge this Court to cut down the laws and protections whose existence Justice White used as the very grounds for finding only a limited review necessary. People with disabilities therefore would be deprived of the heightened constitutional protection of their rights because they were able to obtain the statutory protection which this

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"searching inquiry" of the *Cleburne* majority would be ignored by future litigants and courts. "[T]he Court provides no principled foundation for determining when more searching inquiry is to be invoked." 473 U.S. at 460. Fifteen years later, Justice Marshall's fears have been realized as Petitioners use *Cleburne* to argue for near-total deference to states in setting classifications affecting people with disabilities.

Court is now being asked to find unenforceable.[28] Conversely, people with disabilities would be deprived of the statutory protections Congress found necessary to prevent state-sponsored constitutional deprivations because they had the power to obtain that protection from Congress. This is a classic Catch-22. The authors of *Cleburne* could neither have intended nor foreseen such perverse irony. Had Justice Stevens known that his refusal to apply the rigid three-tier construct would be used to cut down one of the most important civil rights laws for people with disabilities, *Amici* submit that he would have agreed to label his review as "heightened scrutiny," given his rejection of irrational, prejudicial state conduct.

B. The Court Has Not Set "Minimal Scrutiny" as the Level of Scrutiny for Disability-Based Classifications.

Petitioners also misstate the Supreme Court's previous constitutional holdings on disability-based classifications. The cases Petitioners cite did not reach the question of, much less decide, the level of scrutiny to apply.

In *Schweiker v. Wilson,* 450 U.S. 221 (1981), the Court did not reach the question of what level of scrutiny to apply because, it explicitly held, the challenged statute was not a disability-based classification. The Court ruled it had "no occasion to reach this issue [level of scrutiny] because

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[28] Also ironic is Justice White's finding that "rational basis" review would facilitate remedial legislation for people with disabilities. 473 U.S. at 444 ("[M]erely requiring the legislature to justify its efforts ... may lead it to refrain from acting at all.") Yet Petitioners here use this analysis to argue for the unenforceability of perhaps the most prominent remedial measure any legislature has enacted for people with disabilities.

we conclude that this statute does not classify directly on the basis of mental health." *Id.* at 231.

As to *Heller v. Doe*, 509 U.S. 312 (1993), the Court again explicitly declined to determine the level of scrutiny applicable to disability-based classifications. In *Heller*, the Court held that the respondents were estopped from arguing for heightened scrutiny because they had failed to do so below. *Id.* at 318-19; *see also id.* at 334 (O'Connor, J.)(finding state's classification irrational and agreeing that "I would not reach the question whether heightened equal protection scrutiny should be applied").

And in *Cleburne*, Justice White's statement is in any event classic *dicta* because the question of level of scrutiny is unnecessary to the Court's ultimate holding. The Court held unanimously that the Texas ordinance could not withstand *any* constitutional standard of review, including rational basis. 473 U.S. at 448-49. Justice White's statement is also on behalf of only four Justices. Thus, Justice White's articulated choice of level of scrutiny is not binding as precedent. *Metropolitan Stevedore v. Rambo*, 515 U.S. 291, 300 (1995)(Kennedy, J.)("Breath spent repeating dicta does not infuse it with life"); *McLaren v. Fleischer*, 256 U.S. 477, 482 (1921).

C. The History of Invidious Discrimination Against People with Disabilities Justifies Heightened Scrutiny.

Moreover, the states' history of purposeful unequal treatment, *see San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), against people with disabilities justifies the Court's "searching analysis" of disability-based classifications. State-sponsored discrimination against people with disabilities strongly parallels discrimination on the basis of race, national origin, and gender. In *Cleburne*,

Justice Marshall recognized that state-sponsored discrimination against the disabled "in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.* at 461. Indeed, states often excluded people with disabilities from public services and programs to the same extent as racial and ethnic minorities and women, sometimes more so. *Cf. Plyler v. Doe,* 457 U.S. 202 (1982)(school exclusion). Just as the United States restricted certain ethnic minorities from immigrating, *see Chinese Exclusion Cases,* 130 U.S. 581 (1889), similar restrictions applied to people with disabilities. *United States ex rel. Fink v. Todd*, 1 F.2d 246, 249 (2d Cir. 1924)(barring Polish immigrant who was deaf and "feebleminded"), *rev'd on other grounds,* 267 U.S. 571 (1925). Likewise, states barred or criminalized the migration of people who were "lunatics," "infirm," "maimed, "deaf," or "dumb." *See supra* note 11 (listing state statutes); *cf. Edwards v. California,* 314 U.S. 160 (1941).

During the early twentieth century, "a time when xenophobia had become almost a national disease," states repeatedly linked disability to any ethnic group considered "inferior." K. Stampp, *The Tragic Legend of Reconstruction, in Era of Reconstruction* 19 (1965). Henry H. Goddard, a leading proponent of state policies to segregate or eliminate the disabled, tested the I.Q. of immigrants at Ellis Island in 1917 and found that 79 percent of Italians, 80 percent of Hungarians, 83 percent of Jews, and 87 percent of Russians were "feeble-minded." H. Goddard, *Mental Testing and the Immigrants,* 2 J. Delinquency 243, 249, 252 (1917). Superintendents of state institutions urged the U.S. Congress to bar certain nationalities from entry due to their "propensity for defectiveness." J. Trent, *Inventing the Feeble Mind* 168-69 (1994).

Policies asserting the "inferiority" of people with disabilities also mimicked discriminatory laws, policies and attitudes against African-Americans. Publications such as *The Menace of the Feebleminded in Connecticut* (1915) differed little from such Jim Crow texts as *The Negro: A Menace to American Civilization* (1907). "Southern treatment of feeble-minded individuals closely mirrored white attitudes toward blacks in the early years of the twentieth century." S. Noll, *Feeble-Minded in Our Midst* 90 (1995). Many leading eugenicists were avowed white supremacists. Charles Davenport, who authored *Heredity in Relation to Eugenics* (1911) and *State Laws Limiting Marriage Selection in Light of Eugenics* (1913), argued for marriage restrictions on and sterilization for both the "mentally deficient" and African-Americans. As with people with disabilities, Davenport prescribed that African-Americans "shall not be given a license to marry a white person without a certificate from the State Eugenics Board." *Inheriting Shame* at 49-53; *cf. Loving v. Virginia*, 388 U.S. 1, 12 (1967).

The state-mandated segregation and exclusion of people with disabilities followed the Court's ruling in *Plessy v. Ferguson*, 163 U.S. 537, 544-52 (1896).[29] *Plessy* held that the Fourteenth Amendment was no barrier to segregation, and its example legitimized the states' segregation of people with disabilities in institutions and schools. *See* S. Gould, *The Mismeasure of Man* 231 (1995)(1922 U.S. Army finding that 89 percent of African-

[29] The call to segregate disabled Americans also parallels the internment of Japanese-Americans during World War II. *Cf. Korematsu v. United States*, 323 U.S. 214 (1944).

Americans tested as "morons" used to justify racial segregation in schools).[30]

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge the Court to affirm the decision below and that disability-based classifications are subject to heightened scrutiny review.

Respectfully submitted,

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[30] The parallel between racial segregation and exclusion of children with disabilities was explicit in the final defense of racially-segregated schools. In his oral argument to the Court in *Brown v. Board of Educ.*, 347 U.S. 483 (1952), John W. Davis, who argued the case for South Carolina, opened his argument with the following warning:

> May it please the Court, I think if the appellants' construction of the Fourteenth Amendment should prevail here ... I am unable to see why a state would have any further right to segregate ... on the ground of mental capacity.

L. Freedman et. al, *Argument* 51 (1989)(*quoting* Oral Arg. in *Brown v. Bd. of Educ.*).

APPENDICES

APPENDIX A

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX A

COMPENDIUM OF PURPOSEFUL STATE ACTION FOR THE SEGREGATION AND EXCLUSION OF RETARDED PERSONS IN THE FIFTY STATES AND THE DISTRICT OF COLUMBIA

This Appendix presents the official actions of the states promoting and requiring by statute the segregation of retarded people.* Amici have included a sampling of state reports of agencies, officials, committees and boards that constitute the legislative history and the post-enactment history of the laws that were adopted.** All italics have been added by amici.

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*In addition to the 50 states, the federal law enacted by the United States Congress to segregate retarded people found in the District of Columbia is set out at A-76-81.

**For a sampling of state actions affecting retarded people in other areas, *e.g.*, restrictions on marriage, voting, and education, see Appendix B to the Amici Brief of the American Association of Mental Deficiency, *et al.*

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Connecticut. The first recorded provision of a specialized facility for retarded people in this country occurred in Connecticut when the American Asylum for the Deaf and Dumb, located in Hartford, in 1818 counted among its students a few "idiot children." REPORT OF THE COMMISSIONERS ON IDIOCY TO THE GENERAL ASSEMBLY OF CONNECTICUT 62 (1856). Later, the Connecticut legislature provided some funding for a private school in Lakeville. After the turn of the century, though, that facility began receiving a sharply increased number of residents, and it soon became a custodial institution. In 1906 the Director was already reporting that "removals are almost unknown." REPORT OF THE DIRECTORS AND SUPERINTENDENT OF THE CONNECTICUT SCHOOL FOR IMBECILES 6 (1906).

By 1908 the operators of the facility claimed they had "a wide knowledge of the imperative need of providing *permanent* custodial care for the safeguarding of girls and women of feeble mind, and a growing appreciation of the preventive value of equal custodial care for the male of evil tendencies. Backed by effective legislation the care of the defective has resolved itself into a comparatively simply matter. . . ." REPORT OF THE DIRECTORS AND SUPERINTENDENT OF THE CONNECTICUT SCHOOL FOR IMBECILES 12 (1908). "[T]he surest, most humane and most economical solution of the problem of prevention lies in providing custodial care for the feeble minded of every condition and *for a lifetime*." *Id.* at 13.

In 1911, the General Assembly enacted a statute providing that "imbecile[s]" could be admitted to the Lakeville facility by application of the "selectmen" of any town. 1911 Conn. Pub. Acts 1493, ch. 211. In 1913 the state formally took control of the institution by enactment of a statute specifying that its "object" would henceforth be the "custody" of any "imbeciles resident of this state." 1913 Conn. Pub. Acts 1765, ch. 160, §1.

The following year, state officials reported that they were "of the opinion that the problem of the feeble-minded in the State of Connecticut urgently demands a much more adequate provision for these unfortunate individuals than is now supplied. It has been estimated that *there must be at least three thousand feeble-minded in the State, and at the present time, provision is made for only three hundred.* It is a now recognized fact that feeble-mindedness is to a much greater extent than insanity an inheritable condition and it is known that this class is particularly prolific. The criminal, the alcoholic, and the prostitute are all recruited from the ranks of the feeble-minded. The only practicable way to restrict the growth of the feeble-mindedness in the state is to *segregate* the feeble minded and particularly feeble-minded women during the child bearing-period. The question to be decided is really this: Shall we of this generation accept the burden of this care, or shall we hand on to the next generation a much larger share? Undoubtedly failure to *now segregate* the feeble-minded will result in an increasing prevalence of the condition as time goes on." STATE OF CONNECTICUT, BIENNIAL REPORT OF CONNECTICUT SCHOOL FOR IMBECILES, LAKEVILLE, CONN., FOR TWO YEARS ENDED SEPTEMBER 30, 1913-14, at 8 (Pub. Doc. No. 15, 1915). The report also recommended that the "institution should not be situated in the midst of a populous village. While it should be convenient to railroad communication, it should be somewhat *remote from the centers of population for reasons that are obvious.*" *Id.* at 7.

In order to gain public support for the new facility, Superintendent Charles T. LaMoure and the Board of Trustees of the School for Imbeciles published and distributed widely a pamphlet in which they claimed an urgent need to "[s]top the supply of the vicious, the weak, the no-willed people who cannot support themselves in the community — of the criminals and prostitutes and paupers, by cutting off the supply at its source, namely

— by providing adequate *custodial care for the feeble-minded of the State*." THE CONN. SCHOOL FOR IMBECILES, THE MENACE OF THE FEEBLE-MINDED IN CONNECTICUT 9 (1915). These "feeble-minded" people, "though really children, are *allowed to go about through the community as though they were adults*. They have an impaired sense of right and wrong, weak will power and no power of realizing the future. . . .

"Moreover, the feeble-minded are unusually prolific. Therefore the longer the State of Connecticut delays in making adequate provision for the feeble-minded, the greater the burden of feeble-mindedness she will have to bear in future *[sic]*." *Id.* at 3. But they proposed a solution: "The State has the opportunity of buying for this institution a large tract of forest and arable land — between six and seven hundred acres. . . . This property is in the central part of the State, *remote from centres of population* . . . and there is room for the institution to grow indefinitely." *Id.* at 13. For this purpose, "[t]he trustees of the Connecticut School for Imbeciles are asking the General Assembly for authority to sell the present plant, and to use the proceeds and $200,000 to be appropriated by the State in the purchase of this property, and in equipping it for the needs of the institution. This would provide, aside from the necessary alterations to buildings, etc., sufficient cattle and farming implements, so that the institution could produce its own milk and vegetables, *using for the most part the labor of its high grade patients*." *Id.* at 14.

On February 25, 1915, a hearing was held before the state legislature's Committee on Humane Institutions. One witness testified that "hardly a week goes by but what we have a case of a feeble-minded girl or boy called to our attention. We have no way of *getting rid of* these kinds of cases." *Connecticut School for Imbeciles: Hearings on H. B. No. 644 Before the Joint Standing Committee on Humane Institutions* 20 (typed transcript, Feb. 25, 1915) (statement of Mr. Kerner of Waterbury). An-

other thought it necessary for "every feeble-minded child in the school [to be] eliminated or placed in a special class." *Id.* (statement of Miss Wright of Stanford). Superintendent Alexander Johnson of New Jersey's institution at Vineland brought to the Committee's attention "this book called, 'The Menace of the Feeble-Minded in Connecticut,' which was gotten up by the Board of Trustees for the School of Imbeciles, and I would recommend anyone who has any doubt as to the proper care of that class to read this book very carefully." *Id.* at 2 (statement of Dr. Johnson).

On May 20, 1915, the Connecticut legislature followed the recommendations of the state officials and the witnesses at the hearing and appropriated the $200,000 requested for an ambitious construction project on state-owned land at Mansfield Depot, an isolated railway stop sixty miles northeast of Hartford.

By the time he wrote his 1916 Biennial Report, Superintendent LaMoure thought that "[t]he dangers associated with allowing *the feeble-minded to remain at large* among the general population have been so frequently discussed that it is not necessary to do more than refer to them." STATE OF CONNECTICUT, BIENNIAL REPORT OF THE CONNECTICUT TRAINING SCHOOL FOR FEEBLE-MINDED, LAKEVILLE, CONN., FOR THE TWO YEARS ENDED SEPTEMBER 30, 1915-16, at 7 (Pub. Doc. No. 15, 1917). He looked forward to the completion of the new institution, where, he noted, "[m]any of the male *inmates* . . . are capable of doing *a considerable amount of satisfactory farm work* under supervision, and, with a proper farm we should be in a position to improve the quality of our food and save the State a considerable amount of money by raising vegetables, producing our own milk and eggs, and using rather than wasting our garbage by the keeping of pigs." *Id.*

Delaware. On March 21, 1917, the Delaware General Assembly established the state's first home for "the feeble-minded." 1917 Del. Laws 597, ch. 172. The in-

stitutionalization of such persons could be sought by "any reputable citizen of the State," which was to be ordered by the county judge "when by reason of such mental condition, *or of existing social conditions*, it would *be detrimental to any community of this State to allow such person to remain at large*." *Id.* §9.

The legislature also adopted "AN ACT to provide for the sterilization of certain mental defectives," 1923 Del. Laws, ch. 62, authorizing the surgery for those at the state home for whom a "physician, alienist and superintendent unanimously determine that procreation *is unadvisable*." *Id.*

Maine. In 1907, the Legislature of Maine established the "Maine School for Feeble Minded." 1907 Me. Acts 42, ch. 44. A special committee chaired by Governor William T. Cobb "[a]fter careful consideration," located the institution "on an area of farmland. . . . The plan called for a large tract of land, which should be removed from any large town. . . ." Hood, *Pineland Observer*, in PINELANDS, 60 YEARS: 1908-1968 (L. Moore, ed. 1968).

In 1921, the lawmakers extended those eligible for commitment to "idiotic and feeble-minded males, between the ages of six years and forty years, and females, between the ages of six years and forty-five years." 1921 Me. Acts 65, ch. 60. Four years later, the legislature authorized sterilization for all those for whom that surgery "may be indicated for the prevention of the reproduction of further feeble-mindedness." 1925 Me. Acts 198, ch. 208.

Maryland. On March 31, 1888, the General Assembly of Maryland passed "AN ACT to establish an asylum and training school for the feeble minded of the State of Maryland." 1888 Md. Laws 268, ch. 183. In 1906, the lawmakers mandated that the institution "receive, care for and educate, free of charge, all idiotic, imbecile and feeble-minded persons in this state" approved by the board of visitors of the facility. 1906 Md. Laws 653, ch. 362. The law required that "all such persons shall re-

main in the care, *custody and control* of the visitors of said institution, and the visitors of said institution are hereby authorized to *retain all such persons* in their care, *custody and control* at said institution, until such time as in the judgment of said visitors, or a majority of them, the welfare of such persons *and the public interest* shall justify or call for their release. . . ." *Id.* at 653-54.

The Board of Visitors campaigned vigorously for increased admissions. These reports revealed the institution's segregating purposes: "One of the sad features which hangs as a black cloud over the work, is the fact that some hundreds of children, many of whom are *a burden to the family and a menace to the community in which they live*, are continuously knocking at our doors for admission, but only a small number of these can be received solely for want of funds to maintain them, though we have empty beds awaiting their reception." TWENTY-FOURTH REPORT OF THE BOARD OF VISITORS OF THE ROSEWOOD STATE TRAINING SCHOOL, OWINGS MILLS, BALTIMORE COUNTY 5 (1936).

Massachusetts. As a result of a legislatively commissioned report authored by Dr. Samuel Gridley Howe of the Harvard Medical School, S. G. HOWE, FIRST COMPLETE REPORT MADE TO THE LEGISLATURE OF MASSACHUSETTS UPON IDIOCY 16, 30-55 (Mass. Sen. Doc. No. 51, 1848), the Massachusetts legislature, on May 8, 1848 appropriated $2,500 for an experimental school for idiotic children to be located in a wing of the Perkins Institute for the Blind in Boston. Howe was named director, and ten indigent "idiots" were selected as pupils. THIRD AND FINAL REPORT ON THE EXPERIMENTAL SCHOOL FOR TEACHING AND TRAINING IDIOTIC CHILDREN 305 (1852).

With perhaps a premonition of the evils that lurked in his creation, Howe stated in his final report: "Now the danger of misdirection in this pious and benevolent work is, that two false principles may be incorporated with the projected institutions which will be as rotten piles in the

foundations and make the future establishments deplorably defective and mischievous. These are, first, close congregation; and, second, the life-long association of a large number of idiots; whereas, the true, sound principles are: separation of idiots from each other; and then diffusion among the normal population. . . . For these and other reasons it is unwise to organize establishments for teaching and training idiotic children, upon such principles as will tend to make them become asylums for life. . . . *Even idiots have rights* which should be carefully considered! At any rate let us try for something which shall not imply segregating the wards in classes, removing them from our sight and knowledge, ridding ourselves of our responsibility as neighbors, and leaving the wards closely packed in establishments where the spirit of pauperism is surely engendered, and the morbid peculiarities of each are intensified by constant and close association of others of his class." S. G. HOWE, REPORT OF THE SUPERINTENDENT TO THE TRUSTEES OF THE MASSACHUSETTS SCHOOL FOR IDIOTIC CHILDREN (1874).

Howe's advice was forgotten and, by 1886, the Massachusetts legislature had established "a custodial department" for "custody of feeble-minded persons beyond the school age or not capable of being benefited by school instruction." 1886 Mass. Acts & Resolves, ch. 298, §1. After the turn of the century, commitment procedures were modified to permit *any* person, not just relatives, to seek the commitment of "feeble-minded" persons to the institution. *See* 1904 Mass. Acts & Resolves, ch. 459, §5; 1906 Mass. Acts & Resolves, ch. 508, §12.

The superintendent of Massachusetts' institution, Dr. Walter E. Fernald, reported in 1908 that "[t]he existence of this large institution is largely due to the demands of parents, physicians, clergymen, court officers, social workers, and thoughtful people generally, that feeble-minded women should be *permanently removed from the community*. In this State there is an urgent de-

mand for the commitment and *permanent detention* of the higher grade cases of defect, where the social incapacity and the moral weakness are more obvious than the mental backwardness. These cases cannot support themselves, and *are most undesirable and troublesome members of society.*" SIXTY-FIRST ANNUAL REPORT OF THE TRUSTEES OF THE MASSACHUSETTS SCHOOL FOR THE FEEBLE-MINDED AT WALTHAM, FOR THE YEAR ENDING NOVEMBER 30, 1908, at 22-23 (1909).

On June 12, 1912, Superintendent Fernald delivered an influential speech as the Annual Discourse before the Massachusetts Medical Society, printed and widely distributed in pamphlet form by the Massachusetts Society for Mental Hygiene: "The past few years have witnessed a striking awakening of professional and popular consciousness of the widespread prevalence of feeble-mindedness and its influence as a source of wretchedness to the patient himself and to his family, and as a causative factor in the production of crime, prostitution, pauperism, illegitimacy, intemperance and other complex social diseases. . . . The social and economic burdens of uncomplicated feeble-mindedness are only too well known. The feeble-minded are *a parasitic, predatory* class, never capable of self-support or of managing their own affairs. The great majority ultimately become public charges in some form. *They cause unutterable sorrow at home and are a menace and danger to the community.* Feeble-minded women are almost invariably immoral, and if at large usually become carriers of venereal disease or give birth to children who are as defective as themselves. The feeble-minded woman who marries is twice as prolific as the normal woman. . . . *[S]egregation* carried out thoroughly for a generation would largely reduce the amount of feeble-mindedness. The high-grade female imbecile group is the most dangerous class. They are not capable of becoming desirable or safe members of the community. They are never able to support themselves. They are certain to become sexual offenders and

to spread venereal disease or to give birth to degenerate children. Their numerous progeny usually become public charges as diseased or neglected children, imbeciles, epileptics, juvenile delinquents or later on as adult paupers or criminals. The segregation of this class should be rapidly extended until all not adequately guarded at home are placed under strict sexual quarantine. Hundreds of known cases of this sort are now at large because the institutions are overcrowded. Only 2000 feeble-minded persons are now cared for in institutions in this State, and over 1000 applicants are awaiting admission to the institutions. There is an *urgent demand for greatly increased institutional provision* for this class. . . ." W. FERNALD, THE BURDEN OF FEEBLE-MINDEDNESS 3, 7, 10 (1912).

New Hampshire. On March 22, 1901, the New Hampshire General Court enacted legislative to "establish and maintain" the "New Hampshire School for the Feeble-minded Children." 1901 N.H. Laws 597, ch. 102, §1. Although that law limited admissions to "the idiotic and feeble-minded, between three and twenty-one years of age," *id.*, amendments added four years later made provision for others "after they reach the age of twenty-one, if in the judgment of the board of trustees *their segregation seems to be for the best interests of the community*. . . ." 1905 N.H. Laws 413, ch. 23, §1, first for women, *id.*, and later for men as well, 1917 N.H. Laws 645, ch. 141, §1. Later, in 1917, the General Court adopted "AN ACT PERMITTING STERILIZING OPERATIONS" for those for whom that surgery "may be indicated for the prevention of the reproduction of further feeble-mindedness." 1917 N.H. Laws 704, ch. 181, §2. In 1929, the law was extended to permit the superintendent of the institution, if "of opinion that it is for the best interests of the inmate *and of society*" to authorize the surgery without the consent of the "feeble-minded" resident, if after a hearing the governing board of the institution finds that the resident "is the probable potential parent of *socially*

inadequate offspring likewise afflicted." 1929 N.H. Laws 162, 164, ch. 138, §§1, 6.

New Jersey. The New Jersey General Assembly in 1888 established the first New Jersey "home" for the "feeble-minded" at Vineland. 1888 N.J. Laws. 267, ch. 208.

By 1906, state officials were calling for permanent segregation: "It is a fact that the Institutions in New Jersey for the care and training of the feeble-minded do not begin in any way to cover the number of those who should be in the Institutions, and it seems that the Governor, the Legislature and the Commissioner of Charities in their wisdom might hold a conference with the Boards of the Feeble-Minded Institutions, looking towards *the segregation of all the feeble-minded who are now at large*. The feeble-minded belong to that class of defectives of either hereditary degenerates or whose condition is of such a character as should be treated like them, and for whom *the time has come for complete and permanent control.*" ANNUAL REPORT OF THE STATE HOME FOR THE CARE AND TRAINING OF FEEBLE-MINDED WOMEN AT VINELAND, 1906, at 6 (1907). The report indicated that "[t]he most celebrated authorities on the care and segregation of the feeble-minded and other defectives are very much in favor of *the colonization of all defectives* where the development of its members could be properly classified." *Id.* at 7.

The legislature began its response in 1911, by passing "An Act to authorize and provide for the sterilization of feeble-minded (including idiots, imbeciles and morons)." 1911 N.J. Laws 353, ch. 190. That law created a "Board of Examiners of Feeble-minded," which, upon a "find[ing] that procreation is inadvisable and that there is no probability that the condition of such inmate so examined will improve to such an extent as to render procreation by such inmate advisable," was authorized "to

perform such operation for the prevention of procreation as shall be decided by said board of examiners to be most effective. . . ." *Id.* §§ 1, 3.

Two years after its enactment, the New Jersey Supreme Court ruled that New Jersey's law violated the right to equal protection of the laws. *Smith v. Board of Examiners of Feeble-Minded*, 85 N.J.L. 46, 88 A. 963 (1913). The court noted that "the feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the legislature, be a distinct benefit to society. . . . Racial differences, for instance, [also] might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue." 88 A. at 965. The court concluded that "it is clear that the order with which we have to deal threatens possibly the life, and certainly the liberty, of the prosecutrix in a manner forbidden by both the state and federal Constitutions, unless such order is a valid exercise of the police power. . . . The general limitation of such power to which the prosecutrix must appeal is that under our system of government the artificial enhancement of the public welfare by the forceable suppression of the constitutional rights of the individual is inadmissible." *Id.* at 965.

In 1915, the legislature provided for more pervasive segregation of retarded people through the admission to Vineland of "mentally defective men, women and children, *of all ages and grades*. . . ." 1915 N.J. Laws 278, ch. 151, § 2. By 1918, the lawmakers had authorized "the location of additional colonies upon forest reserve or other lands owned by the State." 1918 N.J. Laws 410, ch. 147, art. 6 § 636. It was in these institutions that the "inmates" were to be "kept." *Id.* at 409, 410, §§ 631, 635. In 1919, the legislature required relatives "to *waive all right to remove either permanently or for a limited time*" their kin from any institution. 1919 N.J. Laws 508, ch. 217, § 3.

New York. On July 10, 1851, the Legislature of New York adopted "AN ACT to establish an asylum for idiots." 1851 N.Y. Laws 941, ch. 502.

It was not until 1894 that the New York legislature established an institution in Oneida County purely for the "*custody* of unteachable idiots," designated as "the Rome State Custodial Asylum." 1894 N.Y. Laws 806, ch. 382.

The movement to segregate began most earnestly at the same time as the citizenry began to express concern about the "rising tide" of immigration. In 1905, for example, an article in the *New York Times* typical of those appearing during this period discussed the urgent need for "remedying the evils which have too long been tolerated in the 'dumping' of undesirable immigrants into this country." *Undesirable Immigration*, N.Y. Times, Feb. 10, 1905, at 6, col. 3.

In 1911, the first of many studies purporting to link "feeblemindedness" with the new immigration was published under the auspices of the State Charities Aid Association. The survey found that all but 40 of 317 "mentally defective" children selected "at random" from thirty-two ungraded classes in the New York public schools were either foreign-born or the children of foreign parents. A. MOORE, THE FEEBLE-MINDED IN NEW YORK: A REPORT PREPARED FOR THE PUBLIC EDUCATION ASSOCIATION OF NEW YORK, N.Y. (1911).

By 1912, the *New York Times* was reporting a definite link between immigration and "feeble-mindedness." An article appearing on February 18, 1912 quoted "[a]n important report of the special committee appointed by the New York Society for the Prevention of Cruelty to Children to investigate the subject of abnormal and feeble-minded children. . . ." *Feeble-Minded Scholars Make Up 1 Per Cent of the School Population, Investigators Report*, N.Y. Times, Feb. 18, 1912, at 8, col. 4. The report stated that there were in New York City "10,000 mental or moral defectives who now roam at large

in the community without any proper parental supervision or medical care. Recent census statistics show that 80 per cent of the feeble-minded children in the general population of the United States are the progeny of aliens or naturalized citizens. We may safely assume, therefore, that at least 8,000 of the 10,000 feeble-minded children in the city today were brought here by or are the offspring of the 9,000,000 aliens who have passed through Ellis Island during the past ten years." *Quoted in id.* at cols. 4-5.

Three weeks later, the *New York Times* featured an article on Henry H. Goddard, who was a state administrator for New Jersey's retardation institution at Vineland. The report began: "From the army of 300,000 feeble-minded persons in the United States come the recruits that swell the ranks of the drunkards, criminals, paupers, and other social outcasts. Twenty-five per cent of the girls and boys in our reformatories are lacking in mental fibre and are unable to discern the difference between right and wrong or are too weak in character to do right whenever there is any inducement to do wrong. Sixty-five per cent of the feeble-minded children have a mother or a father, or both, who are feeble-minded. This country has so far taken no steps to segregate these irresponsible parents, so the number of them is constantly increasing. These facts, and many more equally startling, are set forth in an article written for The Survey by Dr. Henry H. Stoddard, [*sic*] director of the department of research of the training school at Vineland, N.J. 'Our Government spends hundreds of thousands of dollars examining immigrants to see that none who are feeble-minded are admitted,' writes Dr. Stoddard [*sic*]; 'but here is a group already in our country who are breeding a race of feeble-minded people more dangerous than many barred by the Immigration Inspectors.' " *Weak-Minded Fill Ranks of Criminals: Dr. Henry Stoddard [sic] Says Social Problems Can Be Solved By Segregating Them*, N.Y. Times, Mar. 10, 1912, at 6, col. 3. Goddard urged, in language

later quoted in some state statutes, "permanent care where they will be happy and harmless," for all those "unable to compete with their fellows on equal terms. . . . This army furnishes the recruits for the ranks of the criminals, paupers, drunkards, the ne-er-do-wells, and others who are social misfits." *Quoted in id.* "[W]hat then is to be done?" he asked. Dr. Goddard answered his own question by proposing that "[a]fter these cases have been discovered they must be removed from the environment in which it has been proved *they are incapable of living normal lives in accordance with the conventions of society*. They must be colonized in groups where they may be perfectly happy and somewhat useful. Only one limitation needs be placed upon them in these places, and that is they must never become parents." *Quoted in id.* Goddard concluded by emphasizing that "[w]e are discussing a possible State policy . . . many parents are either normal or of such a high grade of defectiveness that they never get into court and yet have feeble-minded children. We cannot touch these adults. We must somehow get hold of their children. . . . We may reasonably hope that a policy of segregation, carefully followed, will in a generation or two largely reduce our feeble-minded population and thereby solve our problems of criminals, disease, drunkenness, and crime." *Quoted in id.* at cols. 3-4.

On April 16, 1912, the legislature created a new state board and empowered it to authorize the sterilization "by such operation for the prevention of procreation as shall be decided by said board to be most effective," "any" institutionalized person who, in the judgment of the board, "would produce children with an inherited *tendency*" to "feeble-mindedness, idiocy or imbecility." 1912 N.Y. Laws 924, 925, ch. 445, §351.

New York's special treatment of its "alien defectives" during this period is evidenced by the response state officials gave to a survey form sent to each state on June 20, 1912 by a Pennsylvania commission gathering information to assist the latter state in expanding its own in-

stitutions. New York's response indicated that the state already had nearly 6,000 citizens segregated, noting specially that it "contributes towards the support of *the alien* poor patients in these institutions." REPORT OF THE COMMISSION ON THE SEGREGATION, CARE AND TREATMENT OF FEEBLE-MINDED AND EPILEPTIC PERSONS IN THE COMMONWEALTH OF PENNSYLVANIA 28, 31 (1913). No other group was singled out by New York officials for special support.

It was also about this time that the newly reknowned Henry Goddard was invited by the United States Public Health Service to administer Binet's I.Q. test to the southern and eastern European immigrants arriving in steerage at Ellis Island. "[G]iv[ing] the immigrant the benefit of every doubt," he found that 79% of the Italians, 80% of the Hungarians, 83% of the Jews, and 87% of the Russians he tested were "feeble-minded." Goddard, *Mental Testing and the Immigrants*, 2 J. DELINQUENCY 243, 249, 252 (1917).

The *New York Times* reported in an article entitled *Alien Defectives* appearing on January 13, 1913 that since "three-tenths of feeble-minded children are of alien or naturalized parents, the problem of detecting defective immigrants is very grave." N.Y. Times, Jan. 13, 1913, at 10. The account cited a recommendation by Assistant Surgeon C. P. Knight of the United States Public Health Service at Ellis Island, writing in the January 11 issue of the *American Medical Association Journal*, for "controlling the procreation of the mentally defective by segregating them." *Alien Defectives*, *supra*. As Dr. Knight had stated, "[t]here is scarcely a ship coming into the Port of New York which does not carry among its passengers a mental defective of some degree." *Id.*, *quoting* Knight, *The Detection of the Mentally Defective Among Immigrants*, 60 A.M.A.J. 106 (1913).

In the *A.M.A. Journal* article, Dr. Knight explained that he had "becom[e] familiar with different races" so he could "tell at a glance the abnormal from the normal."

Id. at 107. "In studying the physical characteristics of mental defectives, the various ethnologic types are easily discerned: the dark skin, the curly hair and thick lips of the Ethiopian, the prominent and high cheekbones and deep orbits of the American Indian and the straight coarse hair and peculiar cast of countenance of the Mongolian." *Id.* Even "more important in the determination of the mental status of the alien," according to Dr. Knight, was "close application to the study of the race." Thus, examiners "should interpret the mental reaction of the alien only after having full knowledge of the different racial characteristics, for that which is a defect in an individual of *a race of high mental attainment* may be a normal condition in the existence of other *people who have not attained the same grade of development*. It is perfectly normal for the southern Italian to show emotion on the slightest provocation but should he show the stolidity and indifference of the Pole or Russian, we would look on him with suspicion and perhaps hold him for a detailed examination." *Id.* By the use of such techniques, Knight hoped to "reduc[e] to a minimum the entrance into this country of the mentally and morally low type of alien. Immigration largely contributes to the high percentage of this class in the United States." *Id.* at 106.

By 1914, the "defectives" were being expelled from the public schools. As the *New York Times* editorialized: "If the policy recommended by the Board of Education's committee on ungraded classes had been sensibly adopted in the beginning a good deal of money might have been saved for teaching sound-minded children that has been wasted on mental defectives who could not be helped. The report says: 'Most imbeciles and all idiots can in no way derive any lasting benefits from attendance at the public schools. Their mental condition cannot be improved either by the course of study or discipline. The only practical and humane solution is institutional care.'" *The Feeble-Minded in Schools*, N.Y. Times, Mar. 13, 1914, at 8, col. 4.

That same year, as a result of the public demand for action, the legislature created a special State Commission to study the problem, as urged by the *New York Times*. 1914 N.Y. Laws 772, ch. 272.

The Commission believed that "we are now in a position where it is both a duty and a privilege to *adopt a complete system of public provision* that will in a very large measure *eliminate the burden of feeble-mindedness from the community*." *Id.* at 18.

Sterilization, according to the Commission, was no panacea, since surgery prevented only parenthood, and did not eliminate the other social menaces stemming from permitting "defectives" to be at large. Moreover, such a law might lead to "withdraw[l] from *the influence of our institutions* large numbers of feeble-minded who otherwise might be amenable to whatever advantages and *whatever custodial provision was made*." *Id.* at 19. STATE OF NEW YORK, REPORT OF THE STATE COMMISSION TO INVESTIGATE PROVISION FOR THE MENTALLY DEFICIENT 19 (1915).

The major problem, according to state officials, was that thousands of "mental defectives are at liberty in the community today . . . without restraint or public control." *Id.* at 34. "To attempt reformation is a gross waste of time and of money. The average cost per inmate in a specially organized institution for defectives is half of the average cost in our reformatory institutions." *Id.* at 35. The solution was to expand the institutions and to bring more of the "defectives" under control.

Accordingly, the legislature enacted on May 14, 1919 "AN ACT in relation to mental defectives. . . ." 1919 N.Y. Laws 1683, ch. 633. The law defined "mental defective" to mean "*any person afflicted with mental defectiveness* from birth or from an early age to such an extent that he is incapable of managing himself and his affairs, who for his own welfare or the welfare of others *or of the community* requires *supervision, control* or care, and who is not insane or of unsound mind." *Id.* at 1684, art. 1, § 2(5).

The legislation established a procedure for certifying that one's mental defect was "of such a nature as to require his *supervision, control* and care for his own welfare and for the welfare of others *or for the welfare of the community.*" *Id.* at 1697, art. 4, § 26. This determination was to be made by "qualified examiners." *Id.* § 25.

As a result of this law, state officials were soon overwhelmed with retarded people to segregate. The State Commission for Mental Defectives indicated in 1926 that although it was "gratifying to report progress during the year in additional housing for mental defectives[, t]he need of more beds is so great that it outweighs other considerations." STATE OF NEW YORK, EIGHTH ANNUAL REPORT OF THE STATE COMMISSION FOR MENTAL DEFECTIVES, JULY 1, 1925 TO JUNE 30, 1926, at 7 (Leg. Doc. No. 92, 1927). The scope of the physical expansion necessitated by the 1919 law was noted in the agency's Annual Report: "Defectives who are detrimental to society cannot *be segregated* until institution bed capacity is increased. Those of too low grade intelligence to be cared for in the public schools are often neglected at home and a source of economic disaster to the family. *The segregation of these in institutions* awaits erection of new buildings." *Id.* Thousands of beds were planned and provided throughout the state. *Id.*

Pennsylvania. In 1893 the Pennsylvania General Assembly authorized the construction of a large institution in western Pennsylvania with a capacity for at least "eight hundred inmates," to include a "custodial or asylum department." 1893 Pa. Laws 289, 290, No. 256, § 7. The facility was to be for the "reception" and "detention" of "idiotic and feeble-minded children," *id.* at 291, § 10, the sole restriction being that they be "under the age of twenty years," *id.* § 11. By 1903, a second institution similarly organized was authorized to be built in the eastern part of the state. 1903 Pa. Laws 446, No. 424.

In 1911, the Pennsylvania Conference of Charities and Corrections argued to the legislature that it had a

large problem on its hands. The legislature decided that a comprehensive study was necessary, and so adopted a joint resolution to establish a special commission, "the duty of which Commission shall be to take into consideration the number and status of feeble-minded and epileptic persons in the Commonwealth and the increase of such persons, and to report to the General Assembly at its next session a plan or plans *for the segregation*, care, and treatment of such defectives. . . ." 1911 Pa. Laws 927, § 1. The resolution was enacted because the legislature felt that "[a] proper regard for the public welfare requires that some action be taken looking to *the segregation* of such feeble-minded and epileptic persons." *Id.* (preamble).

On April 21, 1913, the Commission reported to the legislature that "[w]here the mental disability is of a degree which renders the afflicted individuals *unfit for citizenship*, or a menace to the peace, they are regarded and treated as *anti-social beings, and may be permanently segregated* in institutions especially constructed for their reception and care. The condition of mind in amentia is irremediable[;] *the segregation as the rule should therefore be permanent.*" REPORT OF THE COMMISSION ON THE SEGREGATION, CARE AND TREATMENT OF FEEBLE-MINDED AND EPILEPTIC PERSONS IN THE COMMONWEALTH OF PENNSYLVANIA 43 (1913).

The Commission considered retarded people "such an unpleasant burden, that parents usually are more than willing to part with them," *id.* at 38, but "[l]egislation" was "needed to *compel the segregation* of feeble-minded and epileptic persons," *id.* at 40. Who was to be incarcerated? "[A] type of mind must be established as a normal standard for the age, *race* and social status of each individual, and he who falls below this to a recognizable degree is *ipso facto* feeble-minded." *Id.* at 42.

Six weeks later, the legislature enacted comprehensive legislation, creating a new official purpose for the state's institution: "*segregation*" of all "idiotic, imbecile

or feeble-minded persons," 1913 Pa. Laws 494, No. 328, § 1, and the removal of all age restrictions on admissions, *id.* at 496, § 3. The lawmakers also established a new "Village for Feeble-Minded Women" to be "entirely and specially devoted to the reception, segregation [and] detention" of "feeble-minded women of child-bearing age. . . ." 1913 Pa. Laws 1319, No. 817. By 1922, the Superintendent of the Eastern Pennsylvania State Institution for the Feeble-Minded was reporting that "the general public [is] now convinced more than ever that it is a good thing to *segregate the idiot and the imbecile.*" R. SMILOVITZ, A BRIEF HISTORY OF PENNHURST 1908-1926, COMPILED FROM SUPERINTENDENT'S DOCUMENTS (1974).

Rhode Island. The General Assembly of Rhode Island enacted in 1907 "AN ACT FOR THE ESTABLISHMENT, MAINTENANCE, MANAGEMENT, AND CONTROL OF THE RHODE ISLAND SCHOOL FOR THE FEEBLE-MINDED." 1907 R.I. Pub. Laws 89, ch. 1470. Within the institution there was created a special "custodial department for the care and custody of feeble-minded persons beyond school age, or who are not capable of being benefited by school instruction." *Id.* at 90, § 3. Institutionalization could be sought by filing a "complaint in writing" alleging that "any person within the district wherein such court is established is feeble-minded, so as to require restraint for his own welfare *or for the welfare of the public.*" *Id.* at 91, § 6.

The purpose of the institution, according to the first annual report to the legislature, was to "not only protect the [feeble-minded] children themselves, but at the same time *to guard society against the children.*" REPORT OF THE RHODE ISLAND SCHOOL FOR THE FEEBLE-MINDED IN EXETER 20 (1910). State officials strongly encouraged parents to commit their children voluntarily to the facility: "Society is made up of families and when the family suffers society suffers. Talk with any one who has had the opportunity to know intimately the history of families

in which there have been feeble-minded children, and let him tell of the cases of fathers driven to drink, whole families plunged into poverty and pauperism, and of mothers made insane or even done to death *by the presence* of the unfortunate child in the home." *Id.* at 21.

Vermont. In 1913, the General Assembly of Vermont created the "Vermont State School for Feeble-minded Children." 1913 Vt. Acts 96, No. 81, § 1. Proceedings to place a retarded person in the institution could be initiated by, in addition to a parent or guardian, any "selectman of the town . . . in which such child resides." *Id.* at 98, § 13.

In 1916, state officials "report[ed] that the people in Vermont are beginning to take a marked interest in the study of feeble-mindedness, and *its baneful and increasing effects on the population* of the State, and that with a better understanding of the conditions which exist, there will be a tendency to view the handling of the question in a more practical and common sense manner. The burden of feeble-mindedness is felt by the entire public, and every intelligent person who has carefully considered the subject realizes that *this blight on mankind* is increasing at a rapid rate, and that unless radical measures are adopted to curb the influences which tend to promote its growth it will only be a matter of time before the resulting pauperism and criminality will be a burden too heavy for any country or people to bear. *The feeble-minded are a parasitic, predatory class*, never capable of self-support or of managing their own affairs, and the majority of them ultimately become public charges." REPORT OF THE VERMONT STATE SCHOOL FOR THE FEEBLE-MINDED CHILDREN FOR THE PERIOD ENDING SEPTEMBER 30, 1916, at 17-18 (1916).

As a result of the actions of the state, "[t]he public is now fully aware of *the danger the defective is at large* and realizes the importance of instituting means for their control. There is nothing that can be done more effectively toward the prevention of feeble-mindedness, crime and

poverty and *toward the promotion of our best citizenship, than to segregate the feeble-minded* and properly care for them." *Id.* at 18.

Midwestern States

Illinois. On June 24, 1915, the Illinois General Assembly passed a bill establishing a facility as an institution for the "*detention* of feeble-minded persons." 1915 Ill. Laws 245. Such "detention" was mandated not only for the retarded person's "own welfare," but also "for the welfare of others, *or for the welfare of the community*," so long as the person was "not classifiable as an 'insane person.' " *Id.* at 245-46, §1. "*[A]ny* reputable citizen of the county in which such supposed feeble-minded person resides or is found could seek the institutionalization of such a person by filing a petition stating that it was detrimental "*to the welfare of the community, for him to be at large.*" *Id.* at 246, §3. The "guiding and controlling thought of the court" at these proceedings was to be not only "the welfare of the feeble-minded person" but also "the *welfare of the community.*" *Id.* at 249, § 9.

Indiana. In 1914, Indiana officials reported to the Governor that there were still "at the most conservative estimate that can be made, at least four thousand feeble-minded in Indiana" requiring institutionalization, and that "[these] people are at large, *a nuisance to the community* in which they live; nearly all of them paupers; many of them petty criminals; the women filling the houses of prostitution; all of them poor, improvident, lazy — in short, incompetents. These people are increasing rapidly, and unless cared for will, in the next hundred years, bring an unbearable burden on our grandchildren and great-grandchildren. Shall we leave them such an inheritance, or shall we do something now to stop it? Were we to put all these four thousand defectives now at large into institutional care today, this institution could provide for practically all needing the care of an institu-

tion at the end of the next fifty years. No provision is made for adult male feeble-minded in this State, and these men *should be segregated from the world* in some place where they could be made in a measure self-supporting." THIRTY-SIXTH ANNUAL REPORT OF THE INDIANA SCHOOL FOR FEEBLE-MINDED YOUTH FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1914, at 14 (1914).

In 1915, the Board of State Charities of Indiana adopted a resolution that read: "Whereas, The problem of the mental defective is one of our greatest social as well as financial burdens and is increasing in importance and weight every year, and Whereas, Mental defectiveness is believed to be one of the most important if not the most important cause of pauperism, degeneracy and crime," resolved that a committee be established to make recommendations concerning this problem. Governor Ralston acted favorably on this resolution and appointed a Committee on Mental Defectives.

The work of the Committee and its first report, on November 10, 1916, was used to convince the governor and the legislature that it was "imperative that the State must very soon take cognizance of the large number of dependent defectives at large in the State, a menace to society, increasing at a rapid rate, and take steps *to segregate them from the public*, and thus check their reproduction not alone as a matter of philanthropy, but as an economic measure." THIRTY-EIGHTH ANNUAL REPORT OF THE INDIANA SCHOOL FOR FEEBLE-MINDED YOUTH, FORT WAYNE, INDIANA, FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1916, at 14 (1917). The Indiana officials were also "pleased to note that 'The Committee on Mental Defectives' appointed by you to study the problem of Mental Defectiveness in Indiana, recently urgently recommended the enactment of such a law, and we wish to strongly endorse their recommendation and urge that this remedial legislation be had at the coming session of the Legislature. We have deeply felt the need of this law in several cases in recent years, where we found ourselves

utterly helpless to prevent the withdrawal of girls by parents or relatives while we knew that were *unfit to be out in the world. . . .*" *Id.* at 15. They also recommended "the establishment of a new and separate institution to house them from *the danger of contact with the public.*" *Id.*

The Committee on Mental Defectives was reappointed by newly elected Governor James P. Goodrich. The Committee's second report was published March 6, 1919.

One week later, the General Assembly passed as "emergency" legislation "AN ACT to provide for the establishment and government of an Indiana farm colony for feeble-minded" which incorporated practically all of the recommendations of the Committee on Mental Defectives. 1919 Ind. Acts 480, ch. 94. The lawmakers created a commission and ordered it to "select a suitable site for the farm colony" and to "purchase not less than 1,000 acres of land in a body" for it. *Id.* § 2. The law specified that "the buildings to be constructed for its use shall be plain and inexpensive in character," *id.* at 482, § 6, and required that "the labor in constructing such buildings, improvements and facilities shall be supplied as far as applicable by the persons committed to the institution," *id.*

The Committee on Mental Defectives, while expressing gratitude for this legislation, "recommend[ed] increased provision at the Farm Colony for Feeble-Minded" in order for the state "to provide adequately for such cases as cannot, without *menace to the community*, be provided for in the home or the public school." MENTAL DEFECTIVES IN INDIANA: THIRD REPORT OF THE INDIANA COMMITTEE ON MENTAL DEFECTIVES 8 (1922).

The exact nature of the menace was described by the Governor's Committee as follows: "The uncared-for insane, epileptic and feebleminded constitute a social menace, but the *part played by the feebleminded in discounting social progress is by far the most potent influence for evil under which society is struggling today. . . .*

Modern theory grants that the rights of the individual must not interfere with the welfare of the community. From the latter standpoint, the mental defective must be considered as a possible financial burden to the community, a potential menace through the commission of crime, and an increasing detriment to the race through the propagation of his kind. . . . What subject is more vital than this to the people of our state? The menace of the mental defective is a real and pressing one. All individuals and organizations interested in human welfare are urged to cooperate in a state-wide program for *informing the citizens of our state concerning the dangers that threaten*, and awakening them to the disastrous consequences if this important matter is neglected. This should result in such united action as will lessen the burden of pauperism, degeneracy, disease and crime, and decrease the cost to the taxpayers." *Id.* at 6.

In addition to appropriating the increased funds requested for segregation, the legislature, on March 3, 1931, passed "AN ACT providing for the sexual sterilization of feeble minded persons." 1931 Ind. Acts 116, ch. 50. Indiana has been the first state in the country to enact a sterilization law. 1907 Ind. Acts 877, ch. 215. The new law provided that, *at the point at which commitment of any mentally retarded person was sought*, "it shall be the duty of each of the examining physicians appointed by the court" to "certify to the court whether, in his opinion, such person is the probable potential parent of mentally incompetent *or socially inadequate* offspring likewise afflicted." *Id.* § 1. Upon a finding by the court that "the welfare of society and of such feeble-minded person will be promoted by his or her sterilization," the superintendent "may have performed upon such feeble-minded person" sterilization surgery "at such time as he may deem expedient." *Id.* § 3.

Iowa. On March 17, 1876, the General Assembly of Iowa enacted legislation "FOR THE ESTABLISHMENT OF AN ASYLUM FOR FEEBLE MINDED CHIL-

DREN." 1876 Iowa Acts 145, ch. 152. Admission was originally limited to "children between the ages of seven and eighteen." *Id.* at 148, § 15. After the turn of the century, the state authorized the segregation of increased numbers of retarded people. The first to be confined, by enactment of April 7, 1902, were "all feeble-minded women under forty-six years of age." 1902 Iowa Acts 73, ch. 118. The next were "all feeble minded men under 46 years of age." 1909 Iowa Acts 171, ch. 173. In 1921, all age restrictions were repealed. 1921 Iowa Acts 126, ch. 129. State officials continually campaigned for the expansion of facilities for segregation, *see, e.g.*, TWENTY-FOURTH BIENNIAL REPORT OF THE SUPERINTENDENT OF THE IOWA INSTITUTION FOR THE FEEBLEMINDED 7-8 (1922).

On April 13, 1929, the General Assembly enacted legislation "to create a state board of eugenics, to define the powers and duties of said board, [and] to fix the procedure in the sexual sterilization of persons." 1929 Iowa Acts 106, ch. 66. The members of the Board of Eugenics, which consisted of not only the superintendents of state institutions, but also the commissioner of public health, were ordered to "report to the state board of eugenics the names of all persons, male or female, living in this state, of whom he or she may have knowledge, who are feeble-minded . . . and who are a menace to society." *Id.* § 2.

Kansas. In 1881, the Legislature of Kansas established "the Kansas state asylum for idiotic and imbecile youth." 1881 Kan. Sess. Laws 74, ch. 35. Admission was limited to those "not over fifteen years of age." *Id.* at 75, § 6.

The superintendent of the institution, I.W. Clark, in 1906 urged the adoption of a law to enlarge the institution and to accomplish the segregation of feeble-minded persons of all ages. THIRTEENTH BIENNIAL REPORT OF THE KANSAS SCHOOL FOR FEEBLE-MINDED YOUTH, WINFIELD, KANSAS, FOR THE TWO YEARS ENDING JUNE 30, 1906, at 6 (1906). According to Superintendent Clark:

"Legislative attention to a more extended provision for the idiotic and feeble-minded is an imperative demand upon the state. For a score of years the opinions of philanthropists and of those interested in sociologic work have been steadily advancing in a certain direction, until now they are unanimously convinced that *as a matter of public policy all the feeble-minded class should be segregated and provided for by the state*. Various are the reasons which have led up to this conviction, and to most persons they are easily obvious. In this state to-day there are in the county-houses, and *in the communities at large, a large number of this class who are a menace, a blight and a misfortune both to themselves and to the public.*" *Id.* at 12. Therefore, the superintendent recommended that "[t]he age limit of fifteen years should be removed, and the capacity of the home be enlarged so as to receive *all persons who are feeble-minded, regardless of age.*" *Id.* at 6.

On March 12, 1909, the legislature acted. The name of the institution was "hereby changed to the State Home for Feeble-minded," and "[a]ll inmates admitted to said institution" were placed "under the custody and control of the superintendent of said institution, and the superintendent may restrain any such inmate when he deems it necessary for the welfare of such inmate and the proper conduct of the institution." 1909 Kan. Sess. Laws 560-61, ch. 233, §§ 1, 2.

In 1917, the legislature enacted a law providing that, if the Superintendent of the State Home for Feeble-minded "shall certify in writing" to the institution's governing board "that he or she believes that the mental or physical condition of any inmate would be improved thereby or that procreation by such inmate would be likely to result in defective or feeble-minded children with criminal tendencies, and that the condition of such inmate is not likely to improve so as to make procreation by such person *desirable or beneficial to the state*, [then] it shall be lawful to perform a surgical operation for the sterili-

zation of such inmate." 1917 Kan. Sess. Laws 443, ch. 299, § 1.

State officials applauded this legislation, and predicted a marked decrease in the number of feeble-minded persons. However, they reported that "the decrease will be nothing like so great as it should be *unless our immigration laws are so changed as to greatly reduce the number of undesirables from Europe entering this country*. . . . We shall be disappointed further that the decrease is no greater on account of the ease with which feeble-minded persons may obtain a marriage certificate, enter the marriage state and rear a family like unto themselves. . . . Asexualization will be condemned by some as being too harsh a measure, but it becomes incumbent on those who would discourage it to offer something better, for the future will compel us to act. If society by her philanthropic efforts annuls the law of the survival of the fittest, then self-interest will compel her to adopt measures which will prevent the multiplication of those who at best can only add degeneracy to the race." TWENTIETH BIENNIAL REPORT OF THE STATE TRAINING SCHOOL FOR THE TWO YEARS ENDING JUNE 30, 1920, at 7-8 (1920).

Two years later, the superintendent reported "that the population of the institution has grown steadily," and noted "the increased activity of welfare and Red Cross associations over the state that are *constantly on the lookout* for unfortunate people, both young and old" to be institutionalized. TWENTY-FIRST BIENNIAL REPORT OF THE STATE TRAINING SCHOOL FOR THE TWO YEARS ENDING JUNE 30, 1922, at 3 (1922). As a result of the state's policies, people were persuaded to place their retarded relatives in the institution. The Superintendent noted that "as a consequence our ward buildings are becoming crowded, some wards housing twenty per cent more than the estimated capacity. Additional ward room is a necessity." *Id.* at 11.

Kentucky. The General Assembly of the Commonwealth of Kentucky first chartered the "Kentucky Institution for Feeble-minded Children" as a corporate entity in 1894, although the facility apparently had been in existence previous to that date. *See* 1894 Ky. Acts 96, ch. 48, art. I, § 1. Admission to the institution at that time was limited to persons aged six through eighteen "whose mental condition is such that, in the judgment of the superintendent, they may be taught to read and write, or can be educated or trained to do work." *Id.* at 115, art. III, § 5.

In 1918, the General Assembly enacted more malevolent legislation, entitled "AN ACT to provide for the commitment, care, treatment, training, *segregation* and custody" of "feeble-minded" persons. 1918 Ky. Acts 156, ch. 54. The law defined "feeble-minded person" as one who "requires supervision, care, training, control or custody for his own welfare or for the welfare of others *or the community.*" *Id.* § 1. It also established and authorized "The Farm Colony for the Feeble-Minded." including an ambitious plan for new construction on a 500-acre site. *Id.* at 156-57, 159-60, §§ 1, 9, 10. Proceedings to confine a person in the institution could be instituted against any person in the county who appears to be . . . feeble-minded." *Id.* at 161, § 16. The same law made it "one of the special duties of every *health officer and of every public health nurse to institute proceedings to secure the proper segregation and custody of feeble-minded persons*, likely to become fathers or mothers of other feeble-minded persons." *id.*, at 171, § 30, and made it a crime "to aid or abet the marriage of any feeble-minded person, and any person found guilty of aiding or abetting such marriage shall be fined not less than fifty dollars, nor more than five hundred dollars."*id.* § 32.

Michigan. In 1893, the Michigan Legislature established the "Home for the Feeble-Minded and Epileptic." 1893 Mich. Pub. Acts 412, No. 209. The institution was available to "[a]ll feeble-minded and epileptic persons be-

tween the ages of six and twenty-one." *Id.* at 416, §§ 20, 21.

In 1905, to insure long-term segregation, the legislature required that parents and guardians admitting their children to the home "*waive all right to remove* such inmate thereafter either permanently or for a limited time." 1905 Mich. Pub. Acts 169-70, No. 121.

A more comprehensive revision of the law took place four years later, 1909 Mich. Pub. Acts 189, No. 101, eliminating age restrictions, *id.* at 192, § 13, providing for roving physicians "empowered to go where such feeble-minded and epileptic person may be and make such personal examination of him as to enable them to offer an opinion as to his mental condition" in order to certify them as "feeble-minded," *id.* § 14.

If, following a hearing, "such person shall be found and adjudged to be feeble-minded or epileptic the court shall immediately issue an order for his admission to the home for the feeble-minded." *Id.* at 194.

State officials described the value of the new law in maintaining life-long segregation and control in their report to Governor Woodbridge Ferris: "Prior to the enactment of the law of 1909, patients were admitted to this institution by direct application either by parents, guardians, or certain public officials. The matter of the status of these patients was constantly before the Board of Control. The Board found it impossible to *hold certain cases where, in their opinion, the welfare of the State would dictate their being held.* We therefore went to the Legislature, requesting the passage of an act bringing all these cases, where the patient had not had his day in court, before the Probate Courts of the several counties for review and legal commitment. We now have no patients not committed by the Probate Court." TENTH BIENNIAL REPORT OF THE BOARD OF CONTROL OF THE MICHIGAN HOME AND TRAINING SCHOOL AT LAPEER FOR THE BIENNIAL PERIOD ENDING JUNE 30, 1914 (1914).

As John N. McCormick, Chairman of the State Board of Corrections and Charities later stated in official, published instructions to Dr. H. A. Haynes, Superintendent of the Michigan home: "The members of this Board consider it imperative that ample provision be made for the *segregation* and proper care of feeble-minded persons. A recent survey of Michigan removes any doubt as to *the plain duty of the State regarding feeble-mindedness*, not only from a sociological but an economical standpoint as well. From our discussion of the situation with you at the meeting of this Board held at your institution, we are of the opinion that the items stated in your estimate of appropriations for the next two years are needed, and the same are hereby approved." ELEVENTH BIENNIAL REPORT OF THE BOARD OF CONTROL OF THE MICHIGAN HOME AND TRAINING SCHOOL AT LAPEER FOR THE BIENNIAL PERIOD ENDING JUNE 30, 1916, at 7 (1916).

On May 25, 1923, the Michigan legislature adopted "AN ACT to authorize the sterilization of mentally defective persons," which class was "deemed to include idiots, imbeciles and the feeble-minded, but not insane persons." 1923 Mich. Pub. Acts 453, No. 285, § 1. "Whenever a person is adjudged defective," the court was authorized to "order such treatment by x-rays or operation of vasectomy or salpingectomy. . . ." *Id.* at 454, § 2.

In a 1929 amendment, the legislature "hereby declared [it] to be the policy of the state to prevent the procreation and increase in number of feeble-minded, insane and epileptic persons, idiots, imbeciles, moral degenerates, and sexual perverts, *likely to become a menace to society* or wards of the state. *The provisions of this act are to be liberally construed to accomplish this purpose.*" 1929 Mich. Pub. Acts 689-90, No. 281, § 1. The law made it "the duty" of state officials operating the Home for Feeble-minded "to bring to the attention of the governing board or body of such institution and to the state welfare commission" any "mentally defective person who would be likely to procreate children unless

closely confined or rendered incapable of procreation" for whom they were "of the opinion" that it would be "for the best interest of such person *and of society* that such mentally defective person should be sexually sterilized." *Id.* at 690, § 4. The law made it "the duty," in turn, of "the governing board or body of such institution and the state welfare commission to cause an investigation, and examination to be made to determine whether such mentally defective person would be likely, *if allowed to mingle in society*, to procreate children having an inherited tendency to feeble-mindedness, insanity, idiocy, imbecility, epilepsy, or sexual degeneracy, and who *would be likely to become a social menace* or a ward of the state, and whether there is no probability that the condition of such person would improve to such an extent as to avoid such consequences." *Id.* at 690-91.

Minnesota. In 1909, the legislature of Minnesota enacted a law "providing a department for incurables" for "all idiotic and epileptic persons resident of the state. . . ." 1909 Minn. Laws 72, ch. 80. A decade later, because the institution, located at Faribault, had filled beyond capacity, the legislature authorized the state board of control "to select from the public lands of this state, the title to which is vested in the state, not to exceed two (2) sections of land to be used as a location for a colony for feeble-minded persons. . . ." 1919 Minn. Laws 475, ch. 407, § 1. In 1925, the legislature authorized residents of its institutions "to be sterilized by the operation of vasectomy or tubectomy." 1925 Minn. Laws 140, ch. 154.

Missouri. In 1899, the "Missouri Colony for the Feeble-minded" was established. 1899 Mo. Laws 1821, ch. 118, art. 10. As the institution's population grew, the "board of managers of said colony" was "empowered to establish other colonies in temporary or permanent camps." 1919 Mo. Laws 183-84, § 2.

State officials continually requested increased appropriations for expansion. In one annual report to the legislature, for example, Dr. E. E. Brunner, superintend-

ent of the institution, stated: "We need another building to care for the custodial type of idiot patients as that building is entirely overcrowded." SIXTH BIENNIAL REPORT OF THE BOARD OF MANAGERS OF THE STATE ELEEMOSYNARY INSTITUTIONS TO THE FIFTY-SEVENTH GENERAL ASSEMBLY OF THE STATE OF MISSOURI FOR THE TWO FISCAL YEARS BEGINNING JANUARY 1, 1931, AND ENDING DECEMBER 31, 1932, at 291 (1933). According to Superintendent Brunner, "[t]he number of applications is not an indication that the number of feeble-minded is on the increase in the State, but to the education of the people of the State as to *the significance of feeble-mindedness and the need of permanent custodial care. . . .*" *Id.* at 288.

Nebraska. On March 5, 1885, the Legislature of Nebraska passed "AN ACT to establish and endow an Asylum Home for feeble-minded children and adults at or near the city of Beatrice, Nebraska, and making appropriation and levy therefor." 1885 Neb. Laws 255, ch. 52.

By 1914, Silas A. Holcomb, chairman of the newly established state Board of Commissioners, was writing in his first report to the governor and legislature that "[t]he population of the institution has increased to the point where its capacity is taxed to the limit. The demand for additional admissions is steady and will continue." The Board recommended an ambitious expansion program, "[w]ith a view of relieving the congested condition and making suitable provisions for future admissions. FIRST BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS OF STATE INSTITUTIONS TO THE GOVERNOR AND LEGISLATURE OF THE STATE OF NEBRASKA FOR THE BIENNIUM ENDING NOVEMBER 30, 1914, at 9 (1915).

Expanded institutions would be necessary partially as a result of projected population increases for the state. *See id.* They would also be the necessary result, however, of a comprehensive program "submit[ted] for the serious consideration of the Governor and the legislature" of testing and registration which "would unquestionably re-

veal others who are feeble-minded and who *ought not to be returned to society.*" *Id.* at 10.

Observing that "[t]he *only effective measures* to meet these conditions are *segregation and sterilization,*" the Board criticized the then current law: "but in our state neither of these may be applied except as a voluntary proceeding on the part of the legal guardian of the feeble-minded person. . . . It is not a proceeding by which a feeble-minded person may be committed to nor detained in the institution *against the desire* of the parent or guardian." *Id.* at 11. By amending the law, "*the community is enabled to seclude those who cannot safety be allowed to mingle freely with their fellows.* We, therefore, recommend that a statute, similar to those above mentioned, be enacted by this state to provide that admission to the institution for feeble-minded be by order of commitment entered by the county court of the proper county, after due hearing and finding upon a petition filed by the husband, wife, parent, guardian or other person standing in loco parentis to the alleged feeble-minded person, *or* by the superintendents, managers or trustees of any institution having such person in charge, or by the county commissioners, county attorney, superintendent or principal of schools, or a probation officer of the county in which such alleged feeble-minded person shall reside." *Id.* at 11-12.

The legislature responded, enacting an amendment on April 14, 1915, extending the list of people eligible to initiate commitment proceedings to include "the county commissioners, county attorney, any poor law official, any superintendent or principal of schools, or any probation or parole officer of the county of which such idiotic, imbecile or feeble-minded person is a bona fide resident. . . . and the superintendent or managing officer of any public or charitable institution having in charge any idiotic, imbecile or feeble-minded person." 1915 Neb. Laws 294, ch. 131. "[D]etention" was mandated if "it shall appear that the person named in the application is an idiot,

an imbecile or a feeble-minded person and that the best interests of such person *or the welfare of society* require that he be committed to said institution for the feeble-minded." *Id.* at 295."It shall be the duty of said institution to receive all such idiotic, imbecile and feeble-minded persons duly committed thereto and to detain them therein, and to arrest and return any who may escape therefrom." *Id.*

Shortly thereafter, the lawmakers passed "AN ACT to authorize the sterilization of feeble-minded," whose "children would probably become a social menace" and "would be harmful to society." 1915 Neb. Laws 554-55. ch. 237. The act was not approved by the governor, but became operative without his signature.

In 1921, the legislature changed the name of the institution from the "Nebraska Institution for Feeble-minded Youth" to simply the "Nebraska Institution for the Feeble-minded," in recognition of the abandonment of all age restrictions. 1921 Neb. Laws 843, ch. 241, § 1. "The objects of the institution shall be to provide *custodial care* and humane treatment for those who are feeble-minded, *to segregate them from society*, to study to improve their condition, [and] *to classify them*." *Id.*

North Dakota. The Legislative Assembly of North Dakota in 1903 adopted "AN ACT to Establish an Institution for the Feeble Minded," to be "permanently maintained at or near the city of Grafton" for "*all* idiotic and epileptic persons residents of this state." 1903 N.D. Sess. Laws 142, 143, ch. 108, §§ 1, 6. State Superintendent L. B. Baldwin reported that it was "advisable that they be placed in institutions of this character *for life*. A relationship exists between the forms of degeneracy, namely, the criminal, the inebriate, the prostitute and the feeble minded." The view of state officials was that "to protect posterity," it was necessary to undertake "the gathering of this great number of defectives into institutions and colonies." FIRST BIENNIAL REPORT OF THE NORTH DA-

KOTA INSTITUTIONS FOR FEEBLE MINDED AT GRAFTON FOR THE PERIOD ENDING JUNE 30, 1904 TO THE GOVERNOR OF NORTH DAKOTA 9-10 (1904).

In 1909, the Legislative Assembly promoted the permanent segregation of those committed by providing that "any inmate of such institution shall not be removed therefrom," except by written application, and "said request must receive the approval of the superintendent before such inmate can be removed." 1909 N.D. Sess. Laws 317-18, ch. 213, § 1.

In 1913, the legislature provided that "any feeble minded person who is *offensive to the public peace or to good morals, and who is a proper subject for classification and discipline in the institution*, may be committed" without consent. 1913 N.D. Sess. Laws 222, ch. 166, § 1. This provision was enacted as an emergency measure in view of "the fact that there is now no law for compulsory commitment of feeble-minded persons *obnoxious to the peace and good morals of the public.*" *Id.* § 3.

The Legislative Assembly authorized the superintendent to "admit to the institution temporarily, without commitment, under such rules and regulations as the Board of Administration may prescribe, for purposes of observation, such children or adults as are *suspected of being feeble minded or idiotic*, to ascertain whether or not such person is actually mentally defective and a proper case for care, treatment and training in an institution for the feeble-minded." 1921 N.D. Sess. Laws 123, ch. 64.

It was also made "the duty of the superintendent" to "report quarterly to the Board of Examiners herein provided for, all feeble-minded" who were considered as having "potential to producing off-spring, who, because of inheritance of inferior or antisocial traits, *would probably become a social menace. . . .*" 1927 N.D. Sess. Laws 433, ch. 263, § 1. The Board would, following a hearing, "make an order requiring such person to be sterilized." *Id.* at 434, § 3. The purpose of the law was to "*protect society from the menace* of procreation by said inmate." *Id.* § 5.

Ohio. As early as 1857, the General Assembly of Ohio established the "Ohio State Asylum for Idiots." 1857 Ohio Laws 190, 191.

In 1898, Ohio lawmakers established "a custodial department" for the "detention" of "idiotic and feeble-minded children *and adults*," 1898 Ohio Laws 209, § 1, and established an involuntary commitment procedure, *id.* at 211, § 6.

In 1912, Superintendent E. J. Emerick called for increased facilities. "If we could *segregate* these defectives when they are young and *keep them confined during their natural lives*, it would obviate the expense of having them committed repeatedly to our penitentiaries when they grow older. Under our present plan they are sent to our penal institutions for a short term after committing some crime, allowed to go out again, scatter their progeny, and commit other crimes and depredations, only to be recommitted time after time. . . . If we take these children into our institution, brighten them up as best we can, and turn them loose on the public, it has not only been a waste of time, money, and energy, but we have done the world an irreparable injury." Emerick, *The Segregation of the Defective* in PROCEEDINGS OF THE NATIONAL EDUCATION ASSOCIATION, 1912, at 1291-92 (1912). Emerick and others continued the same theme for the next several years. *See* E. J. EMERICK, THE PROBLEM OF THE FEEBLEMINDED (1913); JUVENILE PROTECTIVE ASSOCIATION OF CINCINNATI, THE FEEBLEMINDED, OR, THE HUB TO OUR WHEEL OF VICE (1915); M. SESSIONS, THE FEEBLEMINDED IN OHIO (1918).

In 1919, the legislature established "an additional institution in the state for the *custody, supervision, control*, care, *maintenance*, and training of feeble-minded persons," to receive "feeble-minded persons committed to its custody and care *from any county in the state*." 1919 Ohio Laws 430, § 1.

South Dakota. South Dakota's first facility for the segregation of retarded people was a department of the

Northern Hospital for the Insane established as early as 1893. 1893 S.D. Sess. Laws 169, ch. 101. In 1917, the legislature enacted the state's first sterilization law, making it "the *duty*" of the State Board of Charities and Corrections to order the sterilization of "*any* of said inmates [who] would produce children with *a tendency* to disease, feeble-mindedness, idiocy or imbecility. . . ." 1917 S.D. Sess. Laws 378-379, ch. 236, § 2.

In 1921, the legislature passed an act "RELATING TO THE SEGREGATION OF FEEBLE MINDED." 1921 S.D. Sess. Laws 344, ch. 235. The law created the State Commission for the Control of the Feeble Minded and empowered it "to make all necessary rules and regulations pertaining to the *segregation*, care *and control* of feeble minded persons. . . ." *Id.* §§ 1, 3. It was "the purpose of this act to provide that *all feeble minded persons resident within this state shall become the wards of the state and shall be kept segregated.*" *Id.* § 2. In order to enforce this mandate, the "state commission shall make a survey of all state institutions *and of the state generally* to ascertain the persons whom they believe to be feeble-minded in order that said state commission may make necessary complaints to the county commission." *Id.* at 344-45, § 5. Additionally, "[a]ll teachers" were required to "report *all feeble-minded children coming to their attention* to the state board." *Id.* at 345. This system of outreach efforts to systematically segregate retarded people became known nationwide as the "South Dakota Plan," and became a model for similar efforts in other states. The legislation was deemed by the Commission to "constitute a substantially laid foundation upon which to erect the super-structure of a wise social and economic administration of the feeble-minded problem." STATE OF SOUTH DAKOTA, SECOND BIENNIAL REPORT OF THE COMMISSION FOR SEGREGATION AND CONTROL OF THE FEEBLE-MINDED FOR THE PERIOD ENDING JUNE 30, 1928 TO THE GOVERNOR 2 (1928).

The Commission proposed legislation to require the "identification of all feeble-minded in the state and their registration as a matter of record [,] . . . a continuative census [,] . . . supervision and control by properly constituted authorities [,] . . . [and] the operation of the sterilization law and the anti-marriage law. In fact the law is designed to give *the defective* the protection of the state, and at the same time *to protect the state against his social inadequacy.*" STATE OF SOUTH DAKOTA, THIRD BIENNIAL REPORT OF THE COMMISSION FOR SEGREGATION AND CONTROL OF THE FEEBLE-MINDED FOR THE PERIOD ENDING JUNE 30, 1930 TO THE GOVERNOR 3 (1930). The Commission warned that the proposed legislation was necessary due to the large numbers of "feeble-minded" who were "at large and uncontrolled by the state." *Id.* at 4.

On February 19, 1931, the comprehensive law requested by the Commission was enacted. The term "feeble minded" was broadly and vaguely defined to include "*all individuals*, except the insane, who by reason of mental deficiency are incapable of doing the work of the grades in the public schools *in a reasonable ratio to their years of life; or* who by reason of mental deficiency and other associated defects are incapable of making *the proper adjustments to life* for one of their chronological age." 1931 S.D. Sess. Laws 200, ch. 153, § 1. The Commission drafted into the law its paramount "authority in all matters pertaining to the care, supervision, and control of all feeble-minded persons in the State of South Dakota not confined within the state school and home for the feeble minded. Said commission shall determine the conditions under which such feeble minded persons shall be permitted to remain outside of said institution; and when, and under what conditions, commitment to such institution shall be required." *Id.* § 2. The Commission was given "the duty" to "maintain a continuative census of the feeble minded in the state, and all boards of education, school principals, county superintendents of

schools, city school superintendents, and teachers, are hereby specifically required to give said commission, or its agents, *such access as the commission, or its agents, deem necessary* to all school records, and to *all children* within their control for purposes of examination. . . ." *Id.* § 3(a). Moreover, it was to "be the duty of *all* teachers, city school superintendents and county superintendents of schools" as well as "the duty of *all* doctors, nurses, hospitals, penal and charitable institutions, county welfare boards, public health officers, and public officers, boards, or commissions within the State of South Dakota, to report to the state commission for the control of the feeble minded the name, age, and residence of *all children believed by them to be feeble minded*, and also to furnish whenever requested by the state commission for control of the feeble minded *any and all information* which they may have relative to the name, age, residence and antecedents of any person believed to be feeble minded." *Id.* § 3(b), (c). "Sub-Commissions," were established in each county of the state "under the direct authority of the state commission" with the "specific authority" to "*apprehend, examine, commit, establish guardianships, transport, and maintain the custody* of *any feeble minded person* within their respective counties." *Id.* at 200-01, § 4. "It shall also be the duty of each sub-commission to declare to be feeble minded all of those persons whom the sub-commission, or whom a majority of the members of such sub-commission, find upon investigation and examination to be feeble minded: and forthwith to commit such feeble minded to the supervision and control of the state commission. . . ." *Id.* at 201, § 6.

This legislation, according to the Commission, "would serve the purpose of *securing control and supervision of all the feeble-minded outside of institutions in the State.*" STATE OF SOUTH DAKOTA, FOURTH BIENNIAL REPORT OF THE COMMISSION FOR SEGREGATION AND CONTROL OF THE FEEBLE-MINDED FOR THE PE-

RIOD ENDING JUNE 30, 1932 TO THE GOVERNOR 3 (1932). "[T]he Commission was thoroughly convinced that the *great problem of feeble-mindedness* lay in that large group of feeble-minded *outside of institutions*," who were "scattered throughout the population" and "*in possession of all the rights and liberties of normal people.*" *Id.* The Commission found that most of "the feeble-minded were at large and uncontrolled by the State," *id.*, but that would change: "To have control there must be: 1st, Identification; 2nd, Examination; 3rd, Registration; 4th, Supervision; 5th, Prevention (of marriage); 6th, Sterilization. The new law is designed to fulfill these requirements." *Id.*

Commission personnel "were sent into the various counties and through contact with the schools, welfare boards, health officers, social agencies, physicians, nurses, and public agencies of every kind, sought to *locate every possible feeble-minded individual.*" *Id.* at 9.

Two years later, the Commission reported "the number who have been committed to the State Commission, *those who are segregated in the institution and those who have been sterilized, are now all under State Control.*" STATE OF SOUTH DAKOTA, FIFTH BIENNIAL REPORT OF THE STATE COMMISSION FOR THE CONTROL OF THE FEEBLE-MINDED FOR THE PERIOD ENDING JUNE 30, 1934 TO THE GOVERNOR 5 (1934). The Commission complained, though, that the state's sterilization law was "much too complicated and cumbersome to achieve the best results." *Id.*

The legislature agreed, enacting legislation the following February giving each Sub-Commission, following a hearing, "the power to make an order for the sterilization of any feeble-minded person found within its respective county. . . ." 1935 S.D. Sess. Laws 163, ch. 113, § 1. A petition for sterilization could be "filed with the Chairman of the Sub-Commission of the County in which

the person believed to be feeble-minded is found," by "*any resident* of the County in which such person may be found." *Id.*

The "South Dakota Plan" was in effect in similar form at least through 1968. *See* STATE OF SOUTH DAKOTA. TWENTY-SECOND BIENNIAL REPORT OF THE STATE COMMISSION FOR THE MENTALLY RETARDED FOR THE PERIOD ENDING JUNE 30, 1968 TO THE GOVERNOR (1968).

Wisconsin. Public support in Wisconsin for segregation of retarded people did not begin in earnest until the 1890s. Among those lobbying for the establishment of an institution, through a state-wide petition drive, were the Board of Health, the Federation of Women's Organization, and the State Teachers Association. One such petition, signed by the leading citizens of Washburn County in 1891, called for the building of an institution "for the feeble-minded, who are a constant menace to the good order of society, and to social and domestic safety and tranquility. . . ." *Quoted in* A. RUGG. ONE HUNDRED YEARS OF PUBLIC CARE FOR PEOPLE WITH MENTAL RETARDATION IN WISCONSIN 8 (1983).

Dr. J. H. McBride, a member of the Wisconsin Conference of Charities and Corrections, stated the popular belief that retarded children should be removed from the family: "That an idiot child is, with *its repulsive appearance* and disorderly habits, *a demoralizing association for brothers and sisters*, a thing that would seem to go without saying. Daily experience with the course and rude behavior of an idiot is an experience that must, of necessity, be seriously injuring to young and tender natures." PROCEEDINGS OF THE WISCONSIN CONFERENCE OF CHARITIES AND CORRECTIONS 118 (1890).

In 1895, the legislature established "The Wisconsin Home for feeble-minded." 1895 Wis. Laws 280, ch. 138, § 1. The facility was for "[a]ll feeble-minded, epileptic and idiotic persons, residents of the state." *Id.* at 241, § 4. The law was amended in 1897, to provide that "when-

ever it shall appear that any feeble-minded female of child-bearing age is, by reason of her condition, a menace to society, it is the duty of the supervisor to bring the person before the county judge. . . ." 1897 Wis. Laws, ch. 360, § 1.

In his first biennial report, Superintendent Alfred W. Wilmarth requested of the legislature increased appropriations for additional dormitories in order to "*purge society* and obstruct the increase of feeble-mindedness." WISCONSIN BOARD OF CONTROL. BIENNIAL REPORT 321 (1898). What training that was provided focussed upon "educating the child as a useful member of the *institutional* community *where he will always live.*" WISCONSIN BOARD OF CONTROL. BIENNIAL REPORT 356 (1904). Indeed, Superintendent Wilmarth complained in his report of the "annoyance . . . created by friends of some children who demand their release when they are *entirely unfit to go into general society.*" *Id.* at 376.

By 1912, state officials were reporting that the work of the institution basically "consist[ed] of *separating them from society,* feeding, and clothing them." WISCONSIN BOARD OF CONTROL. BIENNIAL REPORT 20 (1912). That same year, "the Board of Control was directed not to consider 'paroling' anyone who 'might' become a menace to the community." *Id.*

A Visiting Committee of the legislature endorsed the continuation and extension of this approach and, in addition, urged the enactment of a sterilization law because of the "present danger to the race." *Report of the Legislative Visiting Committee,* SENATE JOURNAL 263 (48th Leg. Sess.). In 1913, the legislature authorized the sterilization of residents of the institution for whom it was found "that procreation is inadvisable." 1913 Wis. Laws 972, ch. 693, § 3. The same day, the lawmakers made room for the incarceration of more "feeble-minded" by establishing a second institution. *Id.* at 963, ch. 689, § 1. It was needed since the population of the Home for the Feebleminded increased from 394 to 1060 in the period

1900-1920. WISCONSIN BOARD OF CONTROL. BIENNIAL REPORT 290 (1920).

Southern States

Alabama. On September 29, 1919, the legislature of Alabama established "The Alabama Home" for "mental inferiors." 1919 Ala. Acts 738, No. 568, § 2.

"[D]eclared to be mental inferiors or deficients, or feeble-minded" by the legislature for purposes of confinement at the Home were "[a]ll persons of *whatever age*, who are *deficient or inferior* to the extent of being classed in either of the following groups of the feeble-minded: That is to say, idiots, imbeciles, feeble-minded or morons, and any of whom may be, or may not be epileptics, but not violent or insane."

Id. at 739, § 7. The terms "feeble-minded" and "mental inferior or deficient" were defined in the act to "include every person with such a degree of mental defectiveness from birth, or from an early age that he is unable to care for himself and to manage his affairs with ordinary prudence, *or that he is a menace to the happiness* or safety of himself *or of others in the community*, and requires care, supervision, and control either for his own protection *or for the protection of others.*" *Id.*

The courts were given "the power and authority to commit such person to the Home *notwithstanding* the family or relatives may object thereto." *Id.* at 740, § 9.

The same enactment also instructed the operators of the Alabama Home, that, if "they deem it advisable they are hereby authorized and empowered to sterilize any inmate." *Id.* § 13.

The law provided that "[t]he Superintendent must not grant a parole to any inmate unless he is of the opinion that it will not be detrimental to such inmate *or to society*, and the Superintendent must recall said parole whenever he is satisfied that the welfare of such paroled

inmate, *or of the community to which said inmate is paroled* requires it." *Id.* § 14.

Arkansas. Arkansas' institution "for the Feeble-Minded" was created by an act of the legislature on March 6, 1917. 1917 Ark. Acts 942.

The law broadly defined "feeble-minded" for the purposes of confinement at the institution "to include *all degrees of mental defect* due to arrested or imperfect mental development. Those feeble-minded persons possessing approximate mental development not to exceed that of a normal child of three, shall be classed as 'idiots;' those approximately of the mentality of children from four to seven, inclusive, shall be known as 'imbeciles;' and those approximately with the mental development of normal children from eight to twelve, inclusive, shall be known as 'morons.' " *Id.* § 11.

Florida. In 1919, the Florida Legislature, noting "an alarming state of facts" in a report submitted to it by a committee appointed by the governor (*see* 1915 Fla. Laws 263, ch. 6920), and further noting "[f]rom the findings of the said Committee there can be no doubt that there should be established and created in this State an Institution for the care of Epileptic and Feeble-Minded, where they can be segregated," established the "Florida Farm Colony for Epileptic and Feeble-Minded." 1919 Fla. Laws 231, ch. 7887, preamble & § 1.

The Colony was founded "to the end that these unfortunates may be prevented from reproducing their kind, *and the various communities and the State at Large relieved from the heavy economic and moral losses arising by reason of their existence.*" *Id.* § 8. Its purpose was "for *the segregation*" of the "feeble-minded." *Id.*

Georgia. On August 19, 1919, the General Assembly of Georgia passed "An Act to establish in the State of Georgia an institution to be known as the 'Georgia Training School for Mental Defectives.' " 1919 Ga. Laws 377, No. 373. The institution was ordered built "as soon as

possible" for all "defectives" who "constitute *menaces* to themselves *or the community*." *Id.* § 1.

The statute mandated that "preference in admission shall be given to children and women of child-bearing age," but the institution was open to *any* "defective" who "constitutes *a menace to the happiness* of himself or *of others in the community*" who were "not insane or of unsound mind." *Id.* at 379, § 3.

The institution opened in 1921. A year later, its first superintendent, George H. Preston, M.D., complained that the facility was "not large enough to fulfill the demands made of it." ANNUAL REPORT OF THE GEORGIA TRAINING SCHOOL FOR MENTAL DEFECTIVES, GRACEWOOD GEORGIA 4 (1922). According to the Report, "the fact of primary importance to remember is that a defective child will be a defective adult, and will die a defective. There is not a philosopher's stone to turn the base metals of defect into gold." *Id.*

The Georgia legislature enacted the state's first sterilization law, "for the protection of . . . future generations," in 1937. 1937 Ga. Laws 414, No. 5.

Louisiana. The "State Colony and Training School" was established by the Louisiana legislature in 1918 as "an institution especially provided for the feeble-minded persons of the state of Louisiana." 1918 La. Acts, No. 141, § 1. A "[f]eeble-minded" person was defined as "any person afflicted with mental defectiveness" who "requires supervision, control and care for his own welfare, or for the welfare of others, *or for the welfare of the community*, who is not classifiable as an insane person." *Id.* § 2. "When any person residing in this state shall be supposed to be feeble-minded," and "it is unsafe and dangerous to the welfare of the community for him to be at large without supervision, control, and care, any relative, guardian or conservator *or any reputable citizen of the parish* in which such supposed feeble-minded person resides" was authorized to seek that person's commitment to the state colony. *Id.* § 11. The law required "the guid-

ing and controlling thought of the court throughout the proceedings" to be not only "the welfare of the feebleminded person" but also "the welfare of *the community.*" *Id.* § 15.

Mississippi. On April 3, 1920, the Mississippi Legislature passed "AN ACT to provide for the establishment and maintenance of the Mississippi School and Colony for the Feebleminded . . . [and] to prevent the multiplication of feebleminded criminals and paupers." 1920 Miss. Laws 288, ch. 210. The law included in its definition of "feebleminded" those who "constitute *menaces to the happiness* or safety of themselves *or of other persons in the community,* and require care, supervision and control either for their own protection or for the protection of others." *Id.* §2. The enactment was based upon the legislative finding that "the greatest danger of the feebleminded to the community lies in the frequency of the passing on of mental deficiency from one generation to another, and in the consequent propagation of criminals and paupers." *Id.* at 289. "[A] sufficient acreage of the Rankin County state convict farm" was ordered selected and improved "as soon as practicable" for the establishment of the Mississippi Colony, bearing in mind the desirability of a large tract of land to provide for the growing demands of said institution." *Id.* at 290, §8. The "Plan of the Mississippi Colony" was to provide "the most economical production of shelter, with the necessary distribution of heat, light and food, at the same time securing *the isolation and segregation required.*" *Id.* at 291, §9.

The chancery courts were given jurisdiction over "all cases of legal inquiry in regard to feeblemindedness, including idiocy, imbecility, and the higher grades and varieties of mental inferiority which render the subjects *unfit for citizenship.*" *Id.* at 294, §17. Application for commitment could be made "[a]t any time" by "any relative" to the clerk of the court, "but if the relatives of any feebleminded person shall neglect or refuse to make appli-

cation to the clerk of the chancery court to have him adjudged feebleminded, *and shall permit him to go at large*, the clerk of the chancery court shall, on the application, in writing and under oath, of a citizen of the county in question, issue a summons to the sheriff to summon the alleged feebleminded person and his parent, guardian, or next friend to contest the application." *Id.* An order of commitment was to issue if the court "shall be satisfied that the person is feebleminded, and that for the safety or happiness of the feebleminded himself, *or for the safety or happiness of other persons in the community*, he should be committed to the Mississippi Colony." *Id.* at 297, §23.

The legislature later authorized "the operation of sterilization" to be performed "whenever" the Mississippi Colony's superintendent "shall be of the opinion that it is for the best interests of the patients *and of society* that any inmate of the institution under his care should be sexually sterilized," 1928 Miss. Laws, ch. 294, §1 (emphasis provided), and that the board of trustees of the Colony "shall find that the said inmate" is "feeble minded or epileptic, and by the laws of heredity is the probable potential parent of *socially inadequate offsprings* likewise afflicted, that the said inmate may be sexually sterilized without detriment to his or her general health, and that the welfare of the inmate *and of society* will be promoted by such sterilization." *Id.* at 372, §2.

North Carolina. The General Assembly of North Carolina in 1911 established the "North Carolina School for the Feebleminded" for all persons "idiotic and feebleminded six years of age and upward." 1911 N.C. Sess. Laws 256, ch. 87, §1. The clerk of the county court was authorized to order commitment "[w]henever it is made to appear" that "any person resident in said county" was "a fit subject" for institutionalization. *Id.* at 257, §4. By a 1915 amendment, the General Assembly authorized commitment proceedings for children to be brought by, in addition to a parent or guardian, "third, by a guardian

duly appointed; fourth, by the superintendent of any county home, or by the person having the management of any orphanage, association, charity, society, children's home workers, ministers, teachers, or physicians, or other institutions where children are cared for. Under items third and fourth, *consent of parents, if living, is not required.*" 1915 N.C. Sess. Laws 337-38, ch. 266, §3.

According to state officials, "the aim of the institution" was "to *segregate*" all of "the state's mental defectives." THIRD BIENNIAL REPORT OF THE CASTLE TRAINING SCHOOL, KINSTON, N.C., FOR THE YEARS 1915-1916, at 13 (1916). "[I]f for a period of two or three generations mentally defective men and women were prevented by segregation or sterilization from propagating their kind, mental deficiency would be very materially decreased. . . ." *Id.* at 14.

By 1923, the General Assembly had authorized the commitment of "feeble-minded and mentally defective persons *of any age* when in the judgment of the officer of public welfare and the board of directors of said institution it is deemed advisable." 1923 N.C. Sess. Laws 223, ch. 34, §2.

Under 1929 legislation, the superintendent of the institution was "hereby authorized and directed to have the necessary operation for asexualization or sterilization performed upon *any* mentally defective or feeble-minded inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, *or for the public good.*" 1929 N.C. Sess. Laws 28, ch. 34, §1.

Oklahoma. The Oklahoma legislature established the "Oklahoma Institution for the Feeble-minded" in 1909, for "*all* imbecile and idiotic persons of whatever state who are not insane." 1909 Okla. Sess. Laws 534-35, 536, ch. 34, art. 2, §§1, 4. Application for a commitment could be made by the father or mother, or: "Third: By a guardian duly appointed. Fourth: By the superintendent of any county alms house. Fifth: By the persons having

the management of any institution or asylum where children are cared for. Sixth: By the trustees of any township in Oklahoma. Under the items 'Three,' 'Four,' 'Five,' and 'Six' above, *the consent of parents is not required.*" *Id.* at 538, §8.

In 1931, the legislature authorized the superintendent of the institution to sterilize those "afflicted with" such conditions as "idiocy" or "imbecility." 1931 Okla. Sess. Laws 80, ch. 26, art 3.

South Carolina. On February 12, 1918, the General Assembly of South Carolina passed "AN ACT to Establish the State Training School for the Feeble-minded, and to Provide for Its Government and Maintenance." 1918 S.C. Acts 729, No. 398. Once the facility was built, the "Board of Regents shall notify the Governor, who shall thereupon by proclamation, declare the said Training School for the Feeble-minded ready to receive patients." *Id.* at 731, § 9.

The term "feeble-minded persons" was defined to mean "any moron, imbecile or idiotic person, of whatever grade, who is afflicted with mental defectiveness from birth or from an early age, so pronounced that he is incapable of competing on equal terms with his normal fellows or of managing himself or his affairs with ordinary prudence, and who, therefore, required custodial care and training for his own protection and for the welfare of others *and of the Community*, but who is not insane or of unsound mind. . . ." *Id.* at 731-32, § 10.

Institutionalization proceedings could be initiated by "any reputable citizen of this State" by filing "a petition in writing, setting forth that the person therein named is feeble-minded" and that it was "unsafe or dangerous to the welfare of the community for such person to be at large. . . ." *Id.* at 733, § 13.

State officials reported candidly to the General Assembly that the name of the facility was a misnomer since they "continue to forego" the provision of any "training of mental defectives" but "devote our efforts *mainly to seg-*

regating and giving physical care to as large a number as possible. . . ." FIFTH ANNUAL REPORT OF THE STATE TRAINING SCHOOL FOR THE FEEBLEMINDED. CLINTON. S.C., 1922, at 3 (1923).

As stated by Dr. B. O. Whitten, the Superintendent of the institution, "[i]n almost every instance the propagation of this element of society results in grief and disappointment to the persons in question and will scarcely ever operate in any way which can be expected to promote happiness *or even Anglo Saxon liberty*." SIXTH ANNUAL REPORT OF THE STATE TRAINING SCHOOL FOR THE FEEBLEMINDED. CLINTON. S.C., 1923, at 12 (1924).

In 1935, the legislature authorized the "sterilization of mental defectives." 1935 S.C. Acts 428, No. 304.

Tennessee. On April 14, 1919, the General Assembly of Tennessee passed "An Act to provide for the protection, care, *control, oversight, custody, maintenance* and training of feeble-minded persons; to define who are feeble-minded within the meaning of this Act; and for the establishment, construction and maintenance of the Tennessee Home and Training School for Feeble-Minded Persons." 1919 Tenn. Pub. Acts 561, ch. 150. The Act applied to "any person with such a degree of mental defectiveness" as to be "a *menace to the happiness* or safety of himself *or of others in the community*" who "comprise those commonly called idiots, imbeciles, and morons or high-grade feeble-minded persons" and who "may or may not be subject to epileptic seizures." *Id.* § 2.

"Any relative of a feeble-minded person may make application to have the person so adjudged; but if the relatives and friends of any feeble-minded person shall neglect or refuse to place him or her in the Tennessee Home and Training School for Feeble-Minded Persons, or in a private institution for the feeble-minded, and shall permit him or her *to go at large*, then *any reputable person* being a resident of the county in which such feeble-minded person is found may make application for com-

mitment in writing and under oath to any one of the courts of his county, as above mentioned and shall not be subject to exception or demurrer for defects of form." *Id.* at 564, § 4. It was "the *special duty* of every county health officer and of every County Superintendent of Education in the State to file application for the commitment of feeble-minded persons whose parents or guardians neglect such duty . . . whenever such officer shall have reasonable cause to believe that such commitment is necessary to secure the welfare of such feeble-minded persons *or of those persons with whom they come in contact.*" *Id.* § 5.

State officials acknowledged the legislation as a necessary enactment since "[o]f course, all will agree that there are very many feeble-minded in the State of Tennessee who have never gotten into one of the State institutions and are more or less a *menace and burden* to their respective communities." 1 Q. REP. ST. INSTITUTIONS 30-31 (1919).

Texas. Texas became the first southern state to segregate its retarded citizens when it opened in 1904 a special unit of the State Epileptic Colony, for "idiotic, imbecilic, and feeble-minded epileptics." Gaver, *Mental Retardation*, in MENTAL ILLNESS AND MENTAL RETARDATION: THE HISTORY OF STATE CARE IN TEXAS 20, 22 (1976).

In 1912, the Texas Conference on Charities and Corrections, which had been organized the previous year, presented in the last address of its annual conference a call by Professor Bird T. Baldwin of the University of Texas for an institution for the state's "mental defectives, who are *contaminating society by their presence*, absorbing time and thought that should be devoted to normal children, and later filling the almshouses, charitable institutions, and prisons with illegitimate and irresponsible offspring." Baldwin, *The Causes, Prevention and Care of Feeble-Minded Children*, in PROCEEDINGS OF THE STATE CONFERENCE OF CHARITIES AND CORRECTIONS AT ITS

SECOND ANNUAL MEETING HELD AT WACO, APRIL 14-16, 1912, at 86 (1912). According to Professor Baldwin, these "mental defectives or feeble-minded, who are *by-products of unfinished humanity, belong in an institution* where they may be cared for, made happy, and to some extent useful. They should be *segregated and not allowed to go to our schools with normal children* and should not be permitted to have offspring." *Id.* at 87-88.

The following year, the legislature heeded the call by enacting a bill establishing an institution for the "feeble-minded," but it was vetoed by the governor, apparently on budgetary grounds. This prompted a more concerted effort, again led by the State Conference on Charities and Corrections. Dr. C. S. Yoakum, Secretary of the State Conference, wrote a 156-page monograph calling for the enactment of this legislation. C. S. YOAKUM, CARE OF THE FEEBLE-MINDED AND INSANE IN TEXAS, BULL. U. TEX., NO. 369 (Humanistic Ser. No. 16, Nov. 5, 1914). The monograph called for the removal of "defectives" from the family since "[i]n a home where there is one feeble-minded child among a number of children, we have the definite effects of such communication. To be sure, we recognize the increase in sympathetic understanding that children and parents exercise toward such feeble-minded children; but these moral and social traits are infrequently developed and far overbalanced by the amount of time and energy required to care for such a child, especially if he be of the low grade imbecile or idiotic type. One writer states that we may figure without error that the time of one adult is needed for the care of every feeble-minded or low grade imbecile child or adult. In a custodial institution five of these defective children or adults may be cared for by a single attendant in a much better manner and with much better results than in the home. We are, then, by sending such children to institutions provided for their care, relieving four out of every five of the normal adults now busied in caring for such

defectives, for the economic and business life of the normal community." *Id.* at 44-45. Moreover, "[i]t is certain that the feeble-minded girl and boy are often the bearers of many of the social diseases, and it is especially true that feeble-minded girls are, in the large majority of cases, the inmates of our houses of prostitution." Thus, "the effect *upon the community* of the single individual of this type is bad in the extreme in so far as the social, economic, and moral ideals of that community are concerned." *Id.* at 45, 46.

According to Professor Yoakum, "[t]he only safe procedure is custodial and institutional care *throughout life* for the great majority. . . . Sterilization laws and other means of prevention must for years to come be secondary to this solution of the problem. *Id.* at 66.

The monograph set forth an extensive comparison of the various remedies to the "problem." "Restrictive marriage laws and customs are important, and educative, but fail to reach the irresponsible and degenerate till too late. The 'socially inadequate' are so named just because they are without the influence of law and order. Eugenic education, better environment, and systems of matings purporting to remove defective traits do not affect the impure blood and inheritable factors with the surety necessary to eliminate defects. Laissez-faire or natural selection, euthanasia, neo-malthusianism, and polygamy are either impossible under the protective forces of modern social conditions or are ideas repugnant to present-day ideals of religion and humanity." Of all the solutions, "[t]he evidence so far collected points toward *segregation* [emphasis in the original] as the most feasible, most easily put into force, and least subversive of constitutional prerogative." *Id.* at 82.

Yoakum quoted a report prepared by his parent organization to demonstrate the folly of the early approach taken by schools in the East: "A word to the West! . . . New States and communities should equip themselves properly to attack these problems, and should make their

plans on the basis of *complete control*. Had the States of the East followed this method during the last fifty years their burdens would be only a fraction as great as they now are." *Id.* at 17, *quoting* REPORT OF THE COMMITTEE ON PUBLIC SUPERVISION AND ADMINISTRATION TO THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTIONS, SEATTLE, 1913, at 194 (1913). The bulletin concluded by stressing "the necessity for custodial care and oversight for *all* feeble-minded," through the enactment of legislation to "open[] the door of the institution to all feeble-minded of the State. . . ." *Id.* at 80, 83.

The State Conference meeting in San Antonio in November, 1914, presented additional papers. One concluded that "idiots" have "no economic value, and their care can only remain so much of *a dead load upon society*, whether cared for in a home or in an institution. They are, however, less expense in an institution than in the home, poor farm or asylum." Kelley, *The Colony Plan for the Care of the Feeble-Minded*, 2 BULL. TEX. ST. CONF. CHARITIES & CORRECTIONS 57, 48 (1915). Another concluded that "[f]or the actual idiot there is, or should be, no question as to procedure. The disease indicates its own remedy. The next legislature should make an appropriation for a permanent institution, in which these its most unfortunate citizens could be *permanently segregated*." Smith, *The Feeble-Minded Girls in the Virginia K. Johnson Home*, in *id.* at 61, 62.

Four months later, state representatives Ice Berg Reeves and D. S. McMillan had no difficulty convincing the legislature to reenact their H. B. No. 73, "An Act to provide for the establishment and maintenance of a State Farm Colony for the feeble-minded." 1915 Tex. Gen. Laws 143, ch. 90. With Governor Jim Ferguson's signature on the bill on March 22, 1915, Texas provided for "custodial care" for *all* of "the feeble minded of the State" to the end that these unfortunates may be prevented from reproducing their kind *and society relieved of the heavy economic and moral losses arising from the existence at*

large of these unfortunate persons." *Id.* §§ 1, 2. The colony opened on October 31, 1917. Gaver, *supra* at 24.

State officials, led by Superintendent J. W. Bradfield, urged the legislature to make it easier to populate the institution: "The female can, under the faulty labor conditions of today, make a living for a while, but she is, as a rule, quite unmoral, and makes no effort to protect herself. Her children, usually illegitimate, must, as degenerates, criminals, or defectives, eventually become wards of the State. The male moron is also a potential criminal, and is the class from which inmates for our jails and reformatories are recruited. *Their segregation and control, through life, is the remedy.* This can be obtained only by legally committing them to *an institution where they can be kept permanently.*" In order to resolve this "most serious problem," he "urge[d] the enactment of an ade quate commitment law." Bradfield, *Report of Superintendent, State Colony for Feebleminded*, in FIRST ANNUAL REPORT OF THE STATE BOARD OF CONTROL TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF TEXAS, FISCAL YEAR ENDING AUGUST 31, 1920, at 147 (1921).

The legislature responded favorably, enacting, by a unanimous vote, an act establishing a special "court for the feeble-minded" in each county. 1923 Tex. Gen. Laws 172, ch. 82, § 1. Authority was given to "*[a]ny* person who is a resident of the county having knowledge of a person in his county who appears to be feebleminded" to petition to institutionalize that person. *Id.* § 2. "It shall be sufficient, if the affidavit shall be upon information and belief." *Id.* at 173. A hearing would then be scheduled by the court's issuance of an order "to show cause, if any, why such person should not be declared by said court to be feebleminded. . . ." That order also was deemed to "be sufficient authority to the sheriff or any constable of the county to bring such feebleminded person before the court for such hearing." *Id.* § 3. A jury could be demanded. *Id.* § 1. The finder of fact then "shall investigate

the facts and ascertain whether such alleged feebleminded person is such." *Id.* § 4. "If it be found by the court or jury that the alleged feebleminded person is such, the court shall enter its order so adjudging him, and that he be committed to the custody of the State Coloney [*sic*] for the Feebleminded," *id.* § 5, and "[a]ll persons heretofore or hereafter committed or admitted to such institution shall *remain in its custody as permanent ward of the State* until released by the management thereof," *id.* at 174, § 6.

As a result of the state's encouragement, the "demand for entrance into this institution . . . steadily continue[d] over our accommodations." THIRD REPORT OF THE STATE BOARD OF CONTROL TO THE GOVERNOR AND THE LEGISLATURE OF TEXAS, COVERING PERIOD FROM SEPTEMBER 1, 1924, TO AUGUST 31, 1926, at 9 (1927). According to Superintendent Bradfield "[t]his period has been marked by considerable growth of the institution, and we feel that we are now much better prepared to be of real service to the State. . . . These additions represent a healthy growth and encourage us in the belief that proper provision for the feeble-minded of the State is now being recognized as an absolute necessity." Bradfield, *Superintendent's Report*, in *id.* at 137, 138. In the same report, the Board of Control reported candidly that "[t]his institution is, of course, purely custodial. . . ." *Id.* at 9.

Virginia. On March 20, 1914, the General Assembly of Virginia enacted a law directing the State Board of Charities and Corrections to "investigat[e] . . . the question of the weak-minded in the State, other than insane and epileptic, and to report to the General Assembly of nineteen hundred and sixteen a comprehensive, practical scheme for the training, *segregation* and the prevention of the procreation of *mental defectives*." 1914 Va. Acts 242, ch. 147, § 1. Under the direction of its chairman, S. C. Hatcher, the Board published in 1915 a 128-page compilation of studies, recommendations, and pro-

posed legislation under the title of THE MENTAL DEFECTIVES IN VIRGINIA: A SPECIAL REPORT OF THE STATE BOARD OF CHARITIES AND CORRECTIONS TO THE GENERAL ASSEMBLY OF NINETEEN SIXTEEN ON WEAK-MINDEDNESS IN THE STATE OF VIRGINIA TOGETHER WITH A PLAN FOR TRAINING, SEGREGATION AND PREVENTION OF THE PROCREATION OF THE FEEBLE-MINDED.

A letter of transmittal from Chairman Hatcher to Governor Henry Carter Stuart accompanying the report stated that "the corrupt fruits of mental *degeneracy in any community* will disappear in proportion to the reduction of feeble-mindedness in that community . . . the *most urgent need* in the work of reducing degeneracy is the elimination of the feeble-minded." *Id.* at 5. Quoting approvingly eugenicist C. B. Davenport, Chairman Hatcher recommended that " '[i]f *the State were to segregate its feeble-minded, were to examine for mental defects all immigrants settling in its borders*, and were to deport those found to be defective, there will be a constantly diminishing attendance at State institutions for the feeble-minded, and at the end of thirty years there would be practically no use for such institutions.' " *Id.*

The official report detailed numerous "case studies" to support its recommendations. For example, one such "feeble-minded" case "with certain facial lines make one feel that he is *not far removed from the brute*, and is perhaps cruel with the unconscious cruelty of *an animal.*" *Id.* at 20. Another case "ha[d] not even the glimmerings of intelligence manifested by some of the lower forms of *animal life.*" *Id.* at 41. Another had a wife who was already committed "in a suitable institution, but it seems a pity that the man, who is lower grade mentally than his wife, though not so much of a menace, cannot be *segregated instead of being allowed to run at large*. A larger and more adequate colony would remedy this." Noting that "the civilized nations of the earth are awakened to the menace of feeble-mindedness, and are taking

steps for the elimination and prevention of this evil, the report stated "that the principal things to be sought are *identification* and *control*, with *the object finally of elimination;* and so we will have to rely largely on *segregation* and education for the prevention of feeble-mindedness." *Id.* at 17. "[T]he main idea is to keep them healthy, happy, and out of mischief. [W]e must take our mental defectives back to the soil to get the best results." The report recommended that "the State should have authority *to segregate and to detain* mentally defective persons under proper conditions and limitations. This is in the nature of *an indeterminate sentence*, and is at the basis of the law which provides that the superintendent of the Virginia Colony for the Feeble-minded shall have authority to hold mentally defective persons *as long as he pleases*, and discharge such persons when he pleases. . . ." *Id.* at 114. In terms of those "at large," the State Board proposed that it "be empowered" to "have charge of the registration of the mentally defective persons of the Commonwealth" and to "have supervision of the care of such persons pending admission to institutions." *Id.* Additionally, "whenever, in the opinion of the said Board and the Division Superintendent of Schools, a child has proven to be a mental defective, the said Board should have authority, in its discretion, to transfer such child to the State School for the Feeble-minded." *Id.* at 117.

The General Assembly responded positively to the report, enacting the following March "An ACT to define feeble-mindedness and to provide for the examination, legal commitment, and *the custody and care of feeble-minded persons, and their segregation* in institutions." 1916 Va. Acts 662, ch. 388.

In 1924, the General Assembly passed "An ACT to provide for the sexual sterilization of inmates of State institutions." 1924 Va. Acts 569, ch. 394. This law, the constitutionality of which was upheld by the Supreme Court in *Buck v. Bell*, 274 U.S. 200 (1927), provided that

"whenever the superintendent" of "the State Colony for Epileptics and Feeble-Minded, shall be of opinion that it is *for the best interests* of the patients *and of society* that *any* inmate of the institution under his care should be sexually sterilized, such superintendent is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, the operation of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy." 1924 Va. Acts 569, § 1. The law was enacted, in part, for "the welfare *of society*." *Id.* (preamble). The law provided for an appeal to a special board, but such appeal was to be dismissed if it be found that the "feeble-minded" resident was "the probable potential parent of *socially inadequate offspring* likewise afflicted" and that "the welfare of the inmate *and of society* will be promoted by such sterilization. . . ." *Id.* at 570, § 2.

West Virginia. In 1917, Governor Henry D. Hatfield first called for the erection of "an institution" which would "provide for the *detention* and care of many feebleminded persons now at large and would assist in solving the problem in this state in preventing the multiplication of such class." *Second Biennial Message of Governor H. D. Hatfield to the Legislature* (1917) in STATE PAPERS AND PUBLIC ADDRESSES OF HENRY D. HATFIELD 77 (n.d.)

"If such an institution should be authorized by the legislature, lands should be purchased to the extent of 500 acres upon which the institution should be erected. This would result in the institution becoming nearly self-supporting because of the fact that practically all of the inmates are able bodied and could perform any ordinary labor under competent supervision." *Id.* at 76-77.

In 1921, the Legislature of West Virginia created for "mental defectives" a state institution to be known as the "West Virginia Training School," for "any person" who "because of mental defect *is a menace to the happiness and welfare* of himself or herself *or of others in the com-*

munity, and therefore requires care, training or control for the protection of himself or herself or of others, and yet who is not insane. This type of persons, commonly classed as feeble-minded, including idiots, imbeciles and morons, shall be known and designated as mental defectives for the purposes of this act. Should the school at any time not be able to accommodate all persons of such class offered for admission, preference in admission shall be given to children and women of child-bearing age." 1921 W. Va. Acts 479-80, ch. 131, §§ 1, 3. "Any relative of a person affected may make application, by complaint under oath, to have the person adjudged a mental defective: *but when the relatives of a mentally defective person either neglect or refuse to place said person* in said school, or in some private institution of a like nature, and shall *permit him or her to go at large*, then *any reputable citizen* of the county may, by complaint under oath, make application to the mental hygiene commission for such commitment. . . ." *Id.* at 480, § 4(a).

The same law empowered the "medical staff" at the institution "to administer such medical treatment and perform such surgical operations for the inmates therein as may be necessary and expedient for the cure and prevention of mental defectiveness or disease." *Id.* at 482, § 5.

Western States

Alaska. Alaska's population was insufficient to justify a separate institution for retarded people in that state. In the territorial days, Congress authorized their commitment temporarily to the detention hospitals at Nome and Fairbanks until they could be transferred permanently to institutions in other states. *See* Pub. L. No. 216, § 7, 35 Stat. 601 (1909); Pub. L. No. 306, ch. 424, § 1, 36 Stat. 352 (1910).

Arizona. On April 20, 1927, the Legislature of Arizona established an institution for "mentally defective

children in the State of Arizona, which shall be known as the Arizona Children's Colony." 1927 Ariz. Sess. Laws 367, ch. 96, § 1. Such "defectives," the law mandated, "if not insane, *shall be held* and be determined to be mentally deficient, and be entitled to enter said colony." *Id.* at 369, § 10. Included among the considerations for determining mental deficiency was that the resident "require supervision, control, care and education, for their own welfare, or for the welfare of others, *or for the welfare of the community.*" *Id.* at 370, § 10(a).

California. On March 9, 1887, California became the first state to provide for the segregation, "for life," of "imbecile or feeble-minded" people. 1887 Cal. Stats. 69, ch. 57. The original funding for the facility, located in Santa Clara, had been authorized two years earlier. 1885 Cal. States. 198, ch. 156.

Because the state promoted segregation, the Santa Clara home grew quickly. By 1889, the institution was admitting not only severely retarded people, but also "cases well calculated to deceive the most observing." SONOMA STATE HOME, THE INSTITUTION BULLETIN (1910). Larger accommodations were soon needed. Therefore, on March 6, 1889, the state legislature appropriated $170,000 to purchase land and "to erect proper and substantial buildings . . . upon said site." 1889 Cal. Stats. 69, ch. 75. The state purchased 1660 acres of land in a remote area near Eldridge in Sonoma County. By 1891 buildings were constructed and on November 24 of that year the residents were moved from Santa Clara. STATE BOARD OF CHARITIES AND CORRECTIONS, FIRST BIENNIAL REPORT 62 (1905).

State officials praised this development, noting that the "special province of the Home for the Feeble-Minded is to deal with the incipient aberration of the mental processes—striking at the cause. . . . This institution would *remove from society* the cause, so far as possible to do so." CALIFORNIA HOME FOR THE FEEBLE-MINDED, SIXTH ANNUAL REPORT 30-31 (1890). Indeed, there was

a felt need to track down the "very large class of those unfortunates for whom no application for admission into this institution has been made." *Id.* at 29.

On March 31, 1897, a law was passed amending the 1885 statute that had restricted admissions to those "feeble-minded children between the ages of 5 and 18 years . . . who are incapable of receiving instruction in the common schools." 1885 Cal. Stats. 198, ch. 156, § 8. Under the new law, the institution was "direct[ed] to admit" not only "idiots" but also "epileptics and mentally enfeebled paralytics . . . *irrespective of age*, as the accommodations of the home may permit, and as may, in the judgment of the management, appear suitable subjects for such admission." 1897 Cal. Stats. 251, ch. 188.

In its *First Biennial Report*, the newly created State Board of Charities and Corrections stated: "There are several reasons why the feeble-minded should be cared for in Homes of this sort. Their presence in the community at large is apt to be very detrimental to normal children, and when they come to the adolescent age the danger of reproduction in kind is very great and should, if possible, be prevented." FIRST BIENNIAL REPORT, *supra* at 41.

By the time of its Third Biennial Report, the State Board was stating unequivocally that there were "now in county hospitals, in orphan asylums, and other institutions, and *even in homes*, children who could be much better cared for in the State Home for the Feeble-Minded. Such a child is generally a *menace to the institution, the family, or the community in which he is*. It is desirable in every way to accept into the Home these children, as to *keep those who are now there*." STATE BOARD OF CHARITIES AND CORRECTIONS, THIRD BIENNIAL REPORT 73 (1908).

In 1909, the California legislature became the second in the nation to vote into law "an act to permit asexualization of inmates of . . . the California Home." 1909 Cal. Stats. ch. 720.

This law was progressively extended to cover more individuals by amendments of 1913 and 1917. The 1913 measure specified that sterilization could be performed "with or without the consent of the patient." 1913 Cal. Stats. ch. 363. The 1917 act extended the procedure to all persons deemed to suffer from "marked departures from normal mentality." 1917 Cal. Stats. ch. 489.

State officials also kept constant pressure on the legislature to provide increased appropriations to segregate more and more retarded persons, linking retardation with the immigration of "defectives." In 1915, an act was passed authorizing a legislative committee to investigate the necessity for a second mental retardation institution in the state. 1915 Cal. Stats. 1139, ch. 729. That committee found: "So fundamental is this problem of the feeble-minded that one can assert without fear of successful contradiction that if all the time, money and effort now devoted to the solution of all of our social problems were concentrated for the next ten years on the question of feeble-mindedness, there is not a social problem that would not be nearer its solution at the end of ten years than it will be under the present plan. The first step is to provide state colonies." LEGISLATIVE COMMITTEE ON MENTAL DEFICIENCY, REPORT ON MENTAL DEFICIENCY 22 (1917). The Committee further found, "[i]n considering the advantages of creating such an institution for the proper care of the mentally defective as unfortunate individuals, there is also to be remembered the benefit to society of thus being relieved of the menace of their unsocial conduct." *Id.* at 65. The Committee also recommended legislation "creating a new institution for feeble-minded and epileptic persons, to be located in Southern California." *Id.* at 63.

In the meantime, the State Board commissioned a series of "surveys in mental deviation" to bolster its case for another institution. Based upon the surveys it had commissioned, the Board reported a firm "*relation between race and mental deficiency.*" STATE BOARD OF

CHARITIES AND CORRECTIONS. EIGHTH BIENNIAL REPORT 51 (1918). One of the surveys, focusing upon the Merced County public schools, found that 4.24% of the students were "feebleminded." CALIFORNIA BOARD OF CHARITIES AND CORRECTIONS. REPORT OF THE STATE JOINT COMMITTEE ON DEFECTIVES IN CALIFORNIA 27 (1918). This high number was explained by the fact that the county surveyed "possess[ed] *an exceptionally high proportion of foreign-born* in its population." *Id.* Since "of those found feeble-minded, 75.7% had foreign born parents," it was "evident, therefore, that *most of the feeblemindedness in this country is due to the immigration of undesirable types.*" *Id.* at 35. Referring specifically to greater retardation it found among Mexicans and Portuguese, the report expressed "no wonder that these nationalities are present in the reform schools and state prisons in far greater proportions than their numbers in the state would seem to warrant." *Id.* at 35-36.

The survey found "the *ratio of feeble-mindedness was far higher among Mexicans, Negroes, and recent immigrants from Europe than among those of native American stock*," and concluded that "*California has drawn a large proportion of immigrants of an undesirable type.*" *Id.* at 13-14, 19.

Referring to the survey of the Merced schools, the report found that the "hopelessly feeble-minded should be removed from the public schools and placed under *permanent custodial care.*" *Id.* at 45.

The report "estimated the annual cost of feeble-mindedness in the State of California at $5,000,000" including "relief for indigent and dependent defectives, expenditures for court proceedings and probation work for feeble-minded delinquents, depredations committed by defective delinquents, expense to the state of feeble-minded individuals in the prisons . . . and finally the money which is worse than wasted in the futile attempt to educate feeble-minded children. . . . We have not included in these estimates the losses accruing from

vocational unfitness, alcoholism, venereal disease, and prostitution among the defective population. It would not be surprising if these losses, although less tangible and altogether impossible to estimate accurately, were as great as all the other losses combined." *Id.* at 42.

The report noted the state's "awakening to the menace of the feeble-minded" as one of the most noteworthy movements of present public thought," *id.* at 5, and concluded that "[a]ll of the findings of this study emphasize the *necessity of bringing a larger proportion of our defectives under social surveillance and restraint*," *id.* at 19. Lamenting the fact that "California has but one state institution for the care of the feeble-minded," and arguing for the "*permanent segregation* of all feeble-minded individuals" and to "extinguish the defective strains which now encumber our prisons, reform schools, jails, courts, and public schools," the report urged as the "first step in this direction" the appropriation of funds for "the establishment of an additional state home for the feeble-minded." *Id.* at 51, 43.

The legislature in 1919 appropriated $100,000, 1919 Cal. Stats. 1214, ch. 562, and, in 1921, $120,000, 1921 Cal. Stats. ch. 445, for the construction of buildings at the "Pacific Colony." The facility opened on March 20, 1921. FIRST BIENNIAL REPORT OF THE DEPARTMENT OF INSTITUTIONS OF THE STATE OF CALIFORNIA 68 (1922).

In 1915, the legislature amended the law permitting the institutionalization of any "imbecile or feeble-minded person or any idiot" to the Sonoma State Home. The amendment added a proviso that, in addition to a parent or guardian, "any peace officer may petition said court for an order admitting such a person to such hospital." 1915 Cal. Stats. 1262, ch. 638.

State officials stated that the new law would "make it possible to secure the commitment of children who need institutional care but *whose parents or guardians are averse to such action*." STATE BOARD OF CHARITIES AND CORRECTIONS. BIENNIAL REPORT 30 (1916).

Colorado. On May 5, 1909, the General Assembly of Colorado established that state's institution "for mental defectives." 1909 Colo. Sess. Laws 180, ch. 71. The institution was opened on July 1, 1912, and its purpose from the outset was the "*segregation*, in an institution, for life," of the "defectives." FIRST BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS AND SUPERINTENDENT OF THE COLORADO STATE HOME AND TRAINING SCHOOL FOR MENTAL DEFECTIVES, 1911-1912, at 5 (1912).

The program instituted by Colorado officials to enforce the state's new law was summarized in its *Second Biennial Report:* "The law of Colorado requires the legal commitment of all inmates to the State Home and Training School for Mental Defectives. This gives the management the control regarding the question of removal or discharge, and, in a limited sense, enables the institution *to prevent this class of persons from coming in contact with the populace*. It is impossible to restore feeble-minded persons to a normal condition, and by reason of this fact *they should be kept in an institution indefinitely*, and not be permitted to marry and perpetuate their kind. In years gone by, institutions for this class of persons took some pride in graduating as many as possible, and would turn them *loose in the world* to multiply; but this error is being corrected, as far as possible, by *holding them indefinitely* in institutions provided for their care and training." SECOND BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS AND SUPERINTENDENT OF THE COLORADO STATE HOME AND TRAINING SCHOOL FOR MENTAL DEFECTIVES, 1913-1914, at 4-5 (1914).

By then, a peonage system had been established: "Many of the boys work on the farm and in the garden, in the laundry and in the kitchen. Girls and boys alike assist in making beds, sweeping, scrubbing floors, washing dishes, setting tables, and doing all kinds of housework. Some are capable of driving teams and can handle the hay-stacker quite skillfully. As the institution grows older, and more buildings are provided, and the popula-

tion increases, there will be enough boys who will become skilled by teaching and training to make the institution in a measure self-supporting." SECOND BIENNIAL REPORT OF THE BOARD OF COMMISSIONERS AND SUPERINTENDENT OF THE COLORADO STATE HOME AND TRAINING SCHOOL FOR MENTAL DEFECTIVES, 1913-1914, at 5 (1914).

Hawaii. On April 19, 1919, the Legislature of the Territory of Hawaii passed "AN ACT Providing for the Establishment and Maintenance of a Home for Feeble-Minded Persons." 1919 Haw. Sess. Laws 137, Act 102. The law specified custody, "said home [to be] conducted on the 'farm colony' plan." *Id.* § 2. The Home was open to all Hawaiians requiring institutionalization "for their own welfare, for the welfare of others, *or for the welfare of the community.*" *Id.* at 138, § 4.

The institution was "considered merely a place to get the feeble-minded out of the community. . . ." DEPARTMENT OF INSTITUTIONS, TERRITORY OF HAWAII, THE FIRST TEN YEARS, 1939 THROUGH 1949, at 37 (1949).

Idaho. The "Idaho State Sanitarium" for "the feeble-minded" was established in 1911 by enactment of the Legislature of Idaho. 1911 Idaho Sess. Laws 86, ch. 41. Upon a finding that a person was "feeble-minded," according to the state, a judge "must issue and deliver to some peace officer for service a warrant directing that such person be arrested and taken before any Judge of a Court of record within the county for examination." *Id.* at 94, § 33.

In 1921, it was explicitly mandated that the institution be used for confinement of those "mentally defective from birth and not insane, *irrespective of age*, who are legal residents of the state, and *who are from a social standpoint dangerous to be at large and a menace to society.*" 1921 Idaho Sess. Laws 326, ch. 139, § 1.

To assist in the elimination of this "menace," the legislature adopted "AN ACT TO CREATE A STATE BOARD OF EUGENICS; TO PROVIDE FOR THE

STERILIZATION OF ALL FEEBLE-MINDED . . . WHO ARE A MENACE TO SOCIETY." 1925 Idaho Sess. Laws 358, ch. 194. The law "declared the duty" of the superintendent of the Idaho State Sanitarium to register with the new Board of Eugenics "all persons, male or female, who are feebleminded . . . who are, or in their opinion are likely to become, a menace to society." *Id.* at 359, § 2."[I]f in the judgment of a majority of said Board procreation by such person would produce a child or children having an inherited tendency to feeble-mindedness . . . or who would probably become a social menace or ward of the State, and there is no probability that the condition of such person so investigated and examined will improve to such an extent as to avoid such consequences, then it shall be the duty of such Board to make an order embodying its conclusions with reference to such a person in said respects and specifying such a type of sterilization as may be deemed by said Board best suited to the condition of said person and most likely to produce the beneficial results in the respects specified in this section." *Id.* One of the "objects to be sought" by this chapter was "to protect society from the acts of such person, or from the menace of procreation by such person." *Id.*

Montana. On March 4, 1919, the Legislative Assembly of Montana passed "An Act Relating to the Admission, Care and Retention of Feeble-Minded Persons."1919 Mont. Laws 196, ch. 102. The law established the "Montana Training School for Feeble-Minded Persons" for the "*detention*" of "feeble-minded minors and adults." *Id.* § 1. The law also provided that "*no inmate may be removed from said institution, permanently or temporarily,* except upon a written order of the superintendent or upon an order of any District Court of the state and the provisions of this Section shall apply to adults as well as to the minors therein. The costs of such court action to be borne by the party bringing the action." *Id.* at 198, § 9.

Four years later, the lawmakers authorized surgery that would "surely and permanently nullify the power to procreate offspring, to achieve permanent sexual sterility" of the "feebleminded." 1923 Mont. Laws 535, ch. 164, § 2(e), with the purpose of "protect[ing] society from the menace of procreation by said inmate," *id.* at 537, § 8.

Nevada. Nevada, like Alaska, did not have sufficient population to support its own institution. For this reason, the legislature authorized state officials "to make arrangements with the director of any institution for the feebleminded in California, or Utah, or other states" for Nevada's "feeble-minded." 1913 Nev. Stats. 576, ch. 287.

New Mexico. On March 20, 1925, the Legislature of New Mexico mandated that "[t]here shall be established and hereafter maintained by this State an institution to be known as The Home and Training School for Mental Defectives," for "any person mentally underdeveloped or *faultily* developed" who "requires supervision, care and control for his own welfare, or for the welfare of others, *or for the welfare of the community*, and which mentally defective person is not classified as an insane person." 1925 N.M. Laws 254, ch. 133, §§ 1, 2. Commitment proceedings could be initiated by "[a]ny person over the age of twenty-one years" by alleging "the facts bringing each person within the provisions of this Act and shall state the name and place of residence of such person. . . ." *Id.* at 255, § 5. "The superintendent, with the approval of the Board, may give preference to cases which constitute a *special social menace.*" *Id.*

Oregon. Before authorizing the establishment of a segregative institution, the Oregon Legislative Assembly ordered a formal study. The report that issued indicated that the reason "for custody of feeble-minded" that "outweigh[ed] all others in importance to the State" was that the "*effect of the mingling of the feeble-minded with society* is a *most baneful evil.*" REPORT OF THE BOARD OF BUILDING COMMISSIONERS OF THE STATE OF OREGON

RELATIVE TO THE LOCATION AND ESTABLISHMENT OF AN INSTITUTION FOR FEEBLE-MINDED AND EPILEPTIC PERSONS, TO THE TWENTY-FOURTH LEGISLATIVE ASSEMBLY, REGULAR SESSION, 1970, at 22, 23 (1906). "Once admitted, they remain at the institution *for life.*" *Id.* at 37. The Legislative Assembly followed the recommendation of the report when, on February 23, 1907, it passed "AN ACT Creating the State Institution for Feeble-Minded," for the "care and custody of feeble-minded, idiotic, and epileptic persons." 1907 Or. Laws 145, ch. 83, § 1. The facility was for "all idiotic and epileptic persons" residing in the state for at least a year. *Id.* at 146, § 8.

In 1917, the Legislative Assembly enacted a more sweeping law: "The county judge of any county of this State *shall, upon the application of any citizen* in writing, setting forth that *any person* over five years of age *is feeble-minded or* who, by reason of feeble mindedness, is criminally inclined, or is unsafe to be at large, or may procreate children, *cause such person to be brought before him* at such time and place as he may direct . . . Such judge, if in his opinion said person is feebleminded, shall commit said person to the Institution for the Feebleminded of the state of Oregon for *indeterminate detention. . . .*" 1917 Or. Laws 739, ch. 354, § 1. The same law required that "[a]ll county superintendents of schools shall make reports on the first of June and the first of December of each year to the county courts of their respective counties which report shall contain the names and addresses of all scholars in the public schools and of *all children* of school age in their respective counties who are mentally defective. . . ." *Id.* at 740, § 5.

Soon thereafter, the lawmakers installed a "state board of eugenics," and "declared the duty" of "the superintendent of the state institution for feeble-minded" to "report," on a quarterly basis to the board "all persons, male or female, who are feeble-minded" that "are, or in his opinion are likely to become, a menace to society." 1923 Or. Laws 280, ch. 194, §§ 1, 2. The board's "duty"

was to review the superintendent's opinion and, if in agreement, order sterilization. *Id.* at 280-81, § 3. If the resident failed to consent to the surgery, "such operation shall thereupon be performed upon said person by or under the direction of the superintendent of the institution." *Id.* § 6.

Utah. The "Utah State Training School for Feebleminded" was established in 1929 for "*all* feeble-minded persons who are residents of the State, whose defects prevent them from properly taking care of themselves *or who are a social menace.*" 1929 Utah Laws 102, 108, ch. 75, § 22.

Commitment proceedings could be initiated by "any person" by alleging that someone in the community "by reason of feeble-mindedness is *a social menace.*" *Id.* at 110, § 23(3). "Upon receipt of such application, duly signed and acknowledged, the clerk of the district court shall present the same at the earliest date, and the judge of the district court shall issue a warrant to the sheriff of the county to produce the person described in such application before the court forthwith for examination." *Id.* at 112. If the court "believes" that such person is, "by reason of feeble-mindedness, a social menace" then it "must make an order that such person be confined in the Utah State Training School." *Id.* at 113, § 29.

The same legislation required that "*any patient*" at the institution "should be sexually sterilized" by "the operation of sterilization or *asexualization.*" Such surgery was to be performed "[w]henever the Superintendent and board of trustees of the Utah State Training School shall be of the opinion that it is for the best interests of the patients *and of society.*" *Id.* at 115, § 31.

The state institution was soon filled to capacity. By 1938, the Board of Trustees was able to report to the legislature and the Governor that "[t]he physical growth of the Utah State Training School and the scope of its service to the State of Utah must be recognized as having removed all possible doubt or question as to the *funda-*

mental necessity of maintaining such an institution as a part of the broad program of education *and social regulation and control.*" FOURTH BIENNIAL REPORT OF THE BOARD OF TRUSTEES OF THE UTAH STATE TRAINING SCHOOL, AMERICAN FORK, UTAH, TO THE GOVERNOR AND LEGISLATURE FOR THE BIENNIUM ENDING JUNE 30, 1938, at 3 (1938). "The many actual experiences of the board since the school was established has demonstrated that *the presence of a feebleminded child in a home* is more depressing, expensive and tragic than any known disease. Mental defect vitiates the offspring, and *wounds our citizenry a thousand times more than any plague man is heir to.* Even though this grief is often veiled with a smile, it destroys, demoralizes and sets as naught the lives of too many of our people. The Board of Trustees has considered the so-called South Dakota plan by which responsibility is divided among the different community organizations and state agencies, but all with *the ultimate purpose of segregating, supervising, and then sterilizing* certain of the mentally deficient within the state." *Id.* A major outreach effort was undertaken with the support of the state agency: "Under the welfare program as now operating, community welfare workers are cooperating with the schools in the various communities and in this way many of the mentally deficient *who have heretofore been overlooked and held as problems to their families and immediate neighbors only, are now detected* and the necessity recognized for some action to prevent their continuing as a menace. . . . *When once they are detected and their status is known, proper protection to society requires that they be segregated and supervised, at least until they are sterilized.*" *Id.* at 5.

Washington. In 1905, the Legislature of the state of Washington adopted as an emergency measure "AN ACT providing for the care of defective and feeble minded youth, establishing an institution therefor." 1905 Wash. Laws 133, ch. 70. The law made it "the duty of the clerks of all school districts in the State of Washington at the

time of making the annual reports, to report to the school superintendent of their respective counties the names of all feeble-minded youth residing within their respective districts." *Id.* at 135, § 7. The school superintendents, in turn, were required to annually "report to the State Board of Control" those names. *Id.* at 134, § 4.

The law stated, flatly: "It shall be *the duty* of the parents or guardians of such defective youth to send them to the said institution for feeble-minded." *Id.* at 135, § 9. Moreover, the legislature made it *a crime* for the parents to fail to follow this "duty": upon their failure to send their child to the state institution, the parents "shall *be deemed guilty of a misdemeanor*, and upon conviction thereof, upon the complaint of any officer or citizen of the county or state, before any justice of the peace or superior court, *shall be fined in any sum not less than fifty nor more than two hundred dollars* in the discretion of the court." *Id.*

A 1909 amendment to the law provided that "children who are idiotic, epileptic or afflicted in any particular that renders them *unfitted for companionship with other children shall be segregated. . . .*" 1909 Wash. Laws 260, tit. I., subch. 6, § 2.

In 1913, the legislature changed the name of the state institution to the "State School and Colony," and provided that commitment proceedings could be initiated, without the consent of the parents, by the superintendent of the institution and by county superintendents of schools, and by county commissioners. 1913 Wash. Laws 598, ch. 173, §§ 1, 2. The law provided that "[c]ounty superintendents of schools shall cause to be filled out the prescribed blank applications for admission for such children in their respective districts, who by reason of mental or physical defects are incapable of receiving instruction in the common schools of this state, *or whose habits are such as to render them unfit for companionship with normal children.*" *Id.* at 598-99, § 4. The law also eliminated a restriction in the prior law limiting admissions to

those under twenty-one years of age. *Id.* at 599-600, §§ 8, 9. In accord with the real purpose of the facility, the name was changed once again, this time to "The State Custodial School." 1917 Wash. Laws 224-25, ch. 64.

In 1921, the lawmakers passed "AN ACT to prevent the procreation of feeble minded," which "declared the duty" of the superintendent of the state institution" to report to the Board of Health "all feeble minded . . . who are persons potential to producing offspring who, because of inheritance of inferior *or anti-social traits, would probably become a social menace* or wards of the State." 1921 Wash. Laws 162, ch. 53, § 1. The Board was given "the duty," following an investigation and a hearing, to "make an order directing the superintendent of the institution in which such inmate is confined to perform or cause to be performed upon such inmate such a type of sterilization as may be deemed best by said Board," with the only proviso being that "no person shall be emasculated under the authority of this act except that such operation shall be found to be necessary to improve the physical, mental, neural or psychic condition of the inmate." *Id.* at 163-64, §§ 2, 3.

Wyoming. On February 18, 1907 the Legislature of Wyoming "established in this state an institution for the *custody*, care, education, proper treatment *and discipline* of feeble-minded and epilpetic persons, under the name and style of the "Wyoming Home of the Feeble-Minded and Epileptic." 1907 Wyo. Sess. Laws 188-89, ch. 104, § 1. The institution was created for "*[a]ll* feeble-minded and epileptic persons over the age of six years, who are legal residents of the State of Wyoming." *Id.* at 190, § 9.

Four years later, the name was changed to the "Wyoming School for Defectives," 1911 Wyo. Sess. Laws 166-67, ch. 103, § 1, and an involuntary commitment procedure was established, *id.*

In 1929, the legislature expanded the law to permit the initiation of commitment proceedings by the "pros-

ecuting attorney of the county in which hearing under this Act is proposed to be held, or by *any* citizen of Wyoming," 1929 Wyo. Sess. Laws 156, ch. 95, § 16, and the person to be committed was given the right to demand a jury trial, *id.* at 158, § 20.

District of Columbia

The segregation of retarded people in the District was encouraged and required by the executive and legislative branches of the United States in those days preceding District home rule. The earliest involvement of the United States occurred when, in the nineteenth century, "certain feeble-minded children were taken in charge from time to time by the Secretary of the Interior" and sent to the Pennsylvania Training School at Elwyn. CHARITABLE AND REFORMATORY INSTITUTIONS IN THE DISTRICT OF COLUMBIA: HISTORY AND DEVELOPMENT OF THE PUBLIC CHARITABLE AND REFORMATORY INSTITUTIONS AND AGENCIES IN THE DISTRICT OF COLUMBIA. S. DOC. NO. 207, 69th Cong., 2d sess. 326 (1927).

At the turn of the century the prevailing public sentiment had become one of intolerance. The District Board of Charities in its 1902 Annual Report first called for the establishment of an institution for the District. "Many of the class of children referred to remain children permanently, regardless of their age, and it is important that they should be under custodial care, because of the great menace to the community involved. . . . " S. DOC. NO. 207, *supra* at 327. In 1907, the Board of Charities again stated that it could "not too strongly emphasize the importance of the *permanent segregation* of this class." *Id.* at 328. By 1913, the language of the Board's recommendation had become more urgent yet: "While institutions for the care of the feeble minded are usually designated as 'schools,' it must not be forgotten that many of this class *should be segregated* and under supervision *during their entire lives*, and most of them should *never be al-*

lowed at large. . . . We recommend, therefore, that steps be taken as soon as possible looking to the acquirement of a tract of land and the establishment thereon of a suitable institution for the care and training of the feeble-minded and the *permanent segregation* therein of such of them as are *unfit to be at large in the community*." *Id.* at 329-30. The Monday Evening Club formed a committee to pursuade Congress of the need for "[s]egregation of the adult feeble-minded." *Urges Institution for Feeble-Minded*, Wash. Star, Nov. 18, 1913, at 9.

The United States Department of Labor, through its Bureau of Children's Services, undertook a comprehensive "study of the extent of the problem of mental defectiveness in the District of Columbia," as the Department explained in the introduction to its report, "at the request of a citizen committee . . . organized under the leadership of the Monday Evening Club, [and] composed of representatives of various philanthropic and social agencies and institutions of the District whose dealings with the problems of the community have made them realize the urgent need for securing an institution for the proper care and treatment of mental defectives." U.S. DEPARTMENT OF LABOR, MENTAL DEFECTIVES IN THE DISTRICT OF COLUMBIA: A BRIEF DESCRIPTION OF LOCAL CONDITIONS AND THE NEED FOR CUSTODIAL CARE AND TRAINING 7 (G.P.O. 1915). Federal employees at the Department gathered data regarding "the danger to the *whole community* resulting from the lack of proper provision for those suffering from mental defect." *Id.* at 8.

Under a chapter entitled "reasons for segregation," the Department of Labor listed a number of considerations it thought important. For example, "[a] mentally defective child in a family demands a large share of the energy of the mother and not only interferes with the training of the other children but exercises *a demoralizing influence on the family life*." *Id.* at 20. The "mentally defective" were also a "danger to society": "The number of mental defectives among recidivists empha-

sizes the need of discovering mental defect early in the careers of delinquents and *segregating them permanently* for their own welfare *and for the protection of society. . . .*" *Id.* at 21. Only "[b]y means of *segregating mental defectives* it is possible to cut off at the source a large proportion of degeneracy, pauperism, and crime." *Id.* Indeed, the Department of Labor expressed concern that "[m]any children . . . now in the schools constitute a menace to the other pupils." *Id.* at 18. Thus, according to the federal agency, "[i]nstead of being regarded as an individual misfortune, mental defect has come to be recognized as a destructive social force." *Id.* at 20.

The Department of Labor acknowledged that the establishment of the institution for the District of Columbia would create its own demand: "[T]he number of inmates will increase as the institution becomes better established and as the public becomes familiar with its purposes and the value of its work to those cared for *and to society.* It has been said that the presence in a community of any specified type of defectives becomes apparent only when accommodations are provided for the care of this particular class. Without question this will be found to be the situation in the case of mental defectives." *Id.* at 19. But it would be "out of the question to provide separate institutions for the different types of mental defectives." *Id.* at 24. Referring to the "*various grades*" of "idiot," "imbecile," and "moron," *id.* at 8, 24, the Department recommended that the facility "be large enough to provide the necessary room for *all these classes*, allowing for proper separation of white and colored, male and female," *id.* at 24. The report of the United States Department of Labor concluded by quoting approvingly from an editorial in *Survey* magazine (March 2, 1912): "The greatest need of all is for *more institutional care.* When this has been brought about *in every State* we shall witness a great gaol delivery. . . . Biology and economics unite in

demanding that the strains of *feeble-mindedness shall be eliminated* by the humane *segregation of the mentally defective.*" *Id.* at 28.

The Congress responded to the Department of Labor's strong recommendations, when it "authorized and directed" the District Commissioners "to use a site for a home and school for feeble-minded persons, said site to be located in the District of Columbia. . . ." P.L. No. 67-256, 42 Stat. 39 (1922). The Board of Charities, while generally pleased that Congress had acted, noted that the proviso that the institution be located within the District was "a fatal error" in the enactment. REPORT OF THE BOARD OF CHARITIES OF THE DISTRICT OF COLUMBIA 9 (1922). According to the Board, it would be far better to locate the institution "away from thickly settled communities" since "[f]or these unfortunates, children in mind but many of them old in years, all that society can do is to provide humane and sympathetic care *apart from the excitement and complexities of modern life.*" *Id.* at 10.

In 1923, the Executive Secretary of the Board of Charities, George S. Wilson, accompanied by five other members of the Board, appeared before the Senate Committee on the District of Columbia to express their concern over the specified location of the institution. Wilson testified that "there is a unanimity of opinion on the part of the people of the District of Columbia on this item, greater than we have ever seen exhibited in regard to any matter of great public interest. It is not only the medical and social, and the general welfare organizations, but it is the civic associations and the Board of Trade and other organs of public opinion. At this moment the Board of Trade is circulating among its members a petition, and the Monday Evening club and other bodies are circulating similar petitions, and we are all very much concerned about it." *District of Columbia Appropriations Bill, Hearings Before the Comm. on Appropriations*, 67th Cong., 2d sess. 94-98, 183-84 (Jan. 13, 15, 1923).

In response to questioning by the Senators, Wilson explained further "the difficulties that they have in all these other States. I have just come from a visit to the Michigan school. They have the low-grade idiot, *which the Senator knows is not much above the animal.* They have the imbeciles; *that term is almost self-explanatory.* They have the higher grade, the dangerous cases, the morons, *the fellows that set fire to buildings, and the women who have illegitimate children.* There are at least three classes that no persons having humane instincts would classify together. Those three, multiplied by two to separate the sexes, make six; and then we have to multiply by two to provide for the separate colors here, which makes a minimum of 12 groups of these dependent people that we must provide for—helpless and dependent—and above everything else *unable to associate safely with normal people. Isolation is demanded, absolutely,* and the only thing we can promise to put into their lives is humane *segregation in the open air.*" *Id.* at 96. Wilson concluded his testimony by emphasizing that it was "the segregation from society that is the best of things." *Id.* at 183. Senator Ball commented, "*[i]f you are going to segregate that class* of people to make them more content, you want a farm *entirely separate.*"

The following year, the Congress "authorized and directed" the District Commissioners "to acquire a site for a home and school for feeble-minded persons, said site to be located in the District of Columbia *or in the State of Maryland or in the State of Virginia,* and to erect thereon suitable buildings at a total cost not exceeding $300,000. . . ." P.L. No. 67-457, 42 Stat. 37 (1923).

On March 3, 1925, the Congress enacted "An Act to provide for commitments to, maintenance in, and discharges from the District Training School. . . ." P.L. No. 69-578, 43 Stat. 1135 (1925). The law defined "feeble-minded persons" to include "any person afflicted with mental defectiveness from birth or from an early age, so pronounced that he is incapable of managing himself and

his affairs, or being taught to do so, and who requires supervision, control, and care for his own welfare, or for the welfare of others, or *for the welfare of the community*, and is not insane or of unsound mind. . . ." *Id.* § 2. Congress gave "*any reputable citizen* of the District of Columbia" the authority to initiate commitment proceedings, *id.* § 7, and "if it shall be made to appear to the court by evidence given under oath that it is for the best interest of the alleged feeble-minded person *or of other persons or of the community that such person be at once taken into custody* . . . *id.* § 10, 43 Stat. at 1136.

A week later, on March 10, 1925, the institution, located at Annapolis Junction, "midway between Baltimore and Washington" began operation when "10 boys were received," housed in a "temporary building." REPORT OF THE BOARD OF CHARITIES OF THE DISTRICT OF COLUMBIA 2 (1925). They were immediately put to work: "The boys thus far have been engaged in clearing and grading for the location of buildings, repairing roads, digging trenches, etc., and in general farm work. A good garden was started in time to supply vegetables in abundance during the summer. An encouraging beginning has been made in actual farm work; 60 acres of corn were planted and a good yield will furnish sufficient grain and forage for the stock, chickens, hogs, etc., during the coming winter. Enough potatoes have been raised also to meet the institution needs until next spring." *Id.*

APPENDIX B

I. THE CLEBURNE ORDINANCE IS PART OF A PATTERN OF STATE-IMPOSED, LIFE-LONG SEGREGATION OF RETARDED PEOPLE THAT IN ANIMUS AND PURPOSEFUL UNEQUAL TREATMENT IS PARALLEL TO THE TREATMENT OF BLACK PERSONS.

The decades at the turn into this century imposed a stark legacy upon the country. The xenophobic hysteria of the era, fueled by the new scientism of the eugenics movement, possessed by severe Darwinian strictures and doubts, assaulted by the unprecedented flow of new immigration and the uncertainties of a new industrial age, took on all the force of state power and focused it pervasively against black people and against retarded people and visited upon them the most severe disqualifications imaginable among citizens.

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discourse met "this very difficulty at the outset":

> "We soon realized that having in one of these groups that test to the mentality of say an eight-year-old normal child, we were facing a very interesting problem, as to what was the difference between children who had lived in the world twelve years, and those who had lived twenty years .... In other words, a child who tests according to the Binet test, ten years of age, but is actually fifty years old, may be expected to do a great many things which will quite surprise us because we never have happened to know of a ten-year-old child that could do those things ...."

Goddard's solution to the measurement difficulty?

> "[I]n order to get some accurate idea as to what mental age meant .... we had to cut out all those who were beyond the training period [*i.e.*, those over twenty years]."

Thus Goddard "validated" — and the Era installed and perpetuated in the common prejudice — a measure that does not measure. Goddard, *Four Hundred Feeble-Minded Children Classified By the Binet Method*, 15 J. PSYCHO-ASTHENICS 13 (1910). Others made the point, for example, Kuhlman, *Degree of Mental Deficiency In Children As Expressed By The Relation of Age To Mental Age*, 17 J. PSYCHO-ASTHENICS 132 (1913):

> "Feeble-mindedness is a retarded *rate* of mental development. The term 'arrested development' or 'mental arrest' is a misnomer, for it implies that development has ceased. It is a common observation that feeble-minded children do develop mentally. We also find that their mental ages as measured by the Binet-Simon tests increase as they grow older."

But it is the "ceiling" idea of "mental age" that was codified into invidious

The Jim Crow system segregating people by race was not a 19th century invention, but a creation of this era. C. V. WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed. 1974). Similarly, large, isolated institutions that separate retarded people from the wider society for life are an invention of this era. Like Jim Crow, these institutions were created by state law *intentionally* to *segregate* retarded people. Thus a regime of state-imposed life-long segregation of retarded people was commissioned, and public, as well as private, attitudes and action that would reinforce it were legitimated and evoked.[6] This case will determine whether it shall be disestablished.

In Texas, Jim Crow was enacted and in force in the first decade of this century.[7] Texas created its first institution "for the feeble-minded" of the State by Act of March 22, 1915.[8] Section 2 of the Act declared as its purpose to end "the heavy economic and moral losses arising from the existence at large of these unfortunate persons." The Superintendent of the State Colony for the Feeble-Minded reiterated its purposes in his Third Annual Report:

> "[T]heir segregation and control, through life, is the remedy. This can be obtained only by legally committing them to an institution where they can be kept permanently."[9]

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stereotype, to wit: The January 7, 1985 *Dallas Morning News* (17A, col. 1) opened a six-column feature story with lead paragraphs saying:

"Sarah is three years old — forever.

"She was born 26 years ago, but something went wrong, and her mind stopped growing at the mental age of three."

6. The exclusion in the Cleburne ordinance at issue here did not first appear in the Cleburne zoning ordinance in 1965 as petitioners have incorrectly asserted throughout. The exclusion of "feeble-minded patients" appeared first in the Cleburne ordinances in 1947. It was taken verbatim from the September 11, 1929 ordinance of the City of Dallas. The relevant portions of both ordinances are reproduced at Appendix B.

7. See, *e.g.*, 1907 Tex. Gen. Laws 38.

8. "An Act to Provide for the Establishment and Maintenance of a State Farm Colony for the Feeble-Minded and to Make Appropriations Therefore, and to Declare an Emergency." 1915 Tex. Gen. Laws 143, ch. 90.

9. *Superintendent's Report* (August 31, 1920) in FIRST ANNUAL REPORT OF THE STATE BOARD OF CONTROL TO THE GOVERNOR AND THE LEGISLATURE OF

The animus of the Act creating the State Colony to segregate retarded people is set forth in a 1914 pamphlet of the Texas State Conference on Charities and Corrections.[10] The pamphlet opens:

> "Every state, to maintain the highest efficiency in its governmental and social functions, must consider the nature of its citizens. We are in the habit of dividing citizens into two classes based on their value to society or their amenableness to social custom and law — desirable and undesirable citizens. The latter class comes in conflict with law and is generally considered a menace to good government." *Id.* at 11.

It continues:

> "The general public has already been educated to the belief that it is a good thing to segregate the idiot or the distinct imbecile, but they have not, as yet, been quite so fully convinced as to the proper treatment of this brighter and more dangerous class, the defective delinquent. From a financial standpoint, segregation of the defective delinquent would be a great economy, to say nothing about the more salient feature, that of stopping them from producing their kind. If we could segregate these defectives when they are young and keep them confined during their natural lives, it would

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THE STATE OF TEXAS 147 (1921) (Does. Coll. Tex. St. Archives).

10. C.S. YOAKUM, CARE OF THE FEEBLEMINDED AND INSANE IN TEXAS, BULLETIN OF THE UNIVERSITY OF TEXAS, NO. 369 (Humanistic Ser. No. 16, Nov. 5, 1914) (on file in Pamph. Coll., Tex. St. Archives, Austin, Tex.). The pamphlet originated as a committee report of the State Conference on Charities and Corrections, which, like conferences in other states and the National Conference on Charities and Corrections, was composed of leading citizens, most often drawn from the leading families — professors, journalists and public officials, including mayors and legislators — and was the active progenitor of the Act of March 22, 1915, as it had been of the juvenile court law, the suspended sentence law and other Progressive Era legislation.

> "It aims to bring together for a free exchange of views and experiences for united action all persons and all organizations and institutions, public and private, engaged or interested in work of a charitable or philanthropic character, or in administering our penal and correctional institutions and agencies."

PROCEEDINGS OF THE STATE CONFERENCE ON CHARITIES AND CORRECTIONS 11-12 (1912) [hereinafter cited as PROCEEDINGS].

obviate the expense of having them committed repeatedly to our penitentiaries when they grow older. . . .

" 'Some may say, "Why it is a pity to confine these children in an institution all their lives"; but that is where they are greatly mistaken, as for instance, in Ohio, I can say to you that we have a community of over 1600 of the happiest children in the State in our institution.' . . . . " *Id.* at 46.

The pamphlet goes on to warn:

" 'To discharge, unsterilized, the defective child, after having taught him habits of neatness and a few tricks that make his mental deficiency less noticeable, is worse than never to have put him in an institution.' In other words, the defective is a person who, for the good of society, must end his line of descent with himself. We have indicated in other places that he is personally a menace to society while alive.

"The only safe procedure is custodial care and institutional care throughout life for the great majority. Some authorities believe that a small percentage of those who are trainable may after a time be returned to society. Even these are usually far better off in an institution where they can earn a living under watchful care. In the paragraphs that follow, we shall describe the type of institution that is best suited to such lifelong protection of these derelicts in society." *Id.* at 66.

The pamphlet concludes:

"A clean-limbed, pure-minded, sane thinking people is an ideal alone commensurate with the ideals of this State and this nation. What shall we do to attain, to eliminate this great and ever-increasing source of ignorance, poverty, and crime? 'One of the most shocking and easily cured evils is the increase of the feeble-minded, the begetters of numerous degenerate children. The remedy is their segregation by the State . . .' The answer comes with no uncertain ring.

"This problem of racial betterment is called in modern phrase, eugenics. Our purpose in this discussion has been limited. We have, therefore, discussed the single phase of

the general problem — the elimination of the defective strains. Many answers and solutions have been offered, among them segregation has appealed to society's feelings of humanity and fair play with greatest force. Restrictive marriage laws and customs are important, and educative, but fail to reach the irresponsible and degenerate till too late. . . . Laissez-faire or natural selection, euthanasia, neo-malthusianism, and polygamy are either impossible under the protective forces of modern social conditions or are ideas repugnant to present-day ideals of religion and humanity. Of all the solutions suggested, the two most advocated are sterilization and segregation. Both of these ideas were embodied in bills submitted to the last Legislature in Texas.

"The evidence so far collected points toward *segregation* as the most feasible, most easily put into force, and least subversive of constitutional prerogative. . . ." *Id.* at 81-83 (pamphlet's emphasis).[11]

This Texas undertaking by force of law of the life-long segregation of retarded persons was universal among the states.[12] Each of the states resolved, *de jure*, *as did Pennsylvania*:

"that the Eastern Pennsylvania State Institution for the Feeble-Minded and Epileptic shall be devoted to segregation, care, maintenance, treatment, training and education of epileptic, idiotic, imbecile or feeble-minded persons,"

1913 Pa. Laws 494, No. 328, § 1; and *as did Florida*:

"that there is hereby established . . . a Florida Farm Colony for Epileptic and Feeble-Minded . . . for the segregation and employment of the epileptic and feeble-minded . . . to the end that these unfortunates may be prevented from reproducing their kind, and the various communities and the

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11. A second, separate section of the Texas pamphlet, addressing care of "the insane" (*id.* at 84-145), reflects confusion of the two (109-128), but nowhere calls for, but rather rejects (100, 136-37) permanent, life-long segregation of mentally ill people.

12. See Appendix A, Compendium of Purposeful State Action for the Segregation and Exclusion of Retarded People in the Fifty States and the District of Columbia [references to App. A hereinafter cited as "A-____"].

State at Large relieved from the heavy economic and moral losses arising by reason of their existence,"

1919 Fla. Laws 231, §§ 1, 8; and *as did Utah*, in the same year the predecessor to the Cleburne ordinance was enacted, 1929 Utah Laws 102, ch. 75, §§ 1, 29 (App. A-71.).

The animus of each was everywhere the same. A sampling from Appendix A of the very titles recurrent among the many pamphlets advancing institutional segregation describes vividly that ill-will: *The Menace of the Feeble-Minded in Pennsylvania* (1913); *The Menace of the Feeble-Minded in Connecticut* (1915); *The Burden of Feeble-Mindedness* (1912) (Mass.); *The Feebleminded, Or, The Hub to Our Wheel of Vice* (1913) (Ohio).

The policy of exclusion of retarded people, implemented through state action, is epitomized by a Mississippi law creating a "Colony for the Feebleminded" for the segregation of "all cases" deemed "*unfit for citizenship.*"[13] That law, and the others like it, present as starkly as imaginable the essence of an equal protection violation, exclusion of a particular people from the very "*citizenship*" of the land. Government officials in every state established formal policies in inexorable fashion: Retarded people were "entirely unfit to go into general society,"[14] a "menace to the happiness . . . of the community,"[15] "unfitted for companionship with other children,"[16] a "blight on mankind"[17] whose very "presence"[18] in the community was "detrimental to normal" people,[19] and whose "mingling . . . with society" was "a most baneful evil."[20]

Official policy was to "prevent this class of persons from coming in contact with the populace,"[21] to "purge society"[22] of these

13. A-47 (emphasis provided); *see also* A-19 (Pa.).

14. A-43 (Wis.); *see* A-24 (Ind.) ("unfit to be out in the world").

15. A-44 (Ala.).

16. A-74 (Wash.).

17. A-21 (Vt.).

18. A-21 (R.I).

19. A-63 (Cal.).

20. A-70 (Ore.).

21. A-67 (Colo.).

"anti-social beings,"[23] to "segregate [them] from the world,"[24] so that they "not . . . be returned to society"[25] since "[m]ental defect . . . wounds our citizens a thousand times more than any plague."[26] "Nothing" would better "promot[e] our best citizenship, than to segregate the feeble-minded."[27]

To that end, the enactments of nine state legislatures specified "segregation" in the body of their laws[28] and the official documents of practically each other state and of the United States for the District of Columbia specified the same object.[29]

Institutions, as a matter of law, were houses of "detention"[30] where retarded "inmates" were "kept"[31] and "held"[32] "for life."[33] As the official reports indicate, detention would be "permanent,"[34] in the nature of "an indeterminate sentence"[35] to the "institutional community where he'll always live,"[36] since "a defective child will be a defective adult, and will die a defective. There is not a philosopher's stone to turn the base metals of defect into gold."[37] They could never be let "loose in the world,"[38]

22. A-43 (Wis.).
23. A-19, 20 (Pa.).
24. A-23 (Ind.).
25. A-34 (Neb.).
26. A-73 (Utah).
27. A-21-22 (Vt.).
28. A-45 (Fla.); A-29 (Ky.); A-47 (Miss.) ("isolation and segregation"); A-35 (Neb.) ("to segregate them from society"); A-9 (N.H.); A-19 (Pa.); A-38 (S.Dak.); A-57, 59 (Va.); A-74 (Wash.).
29. *E.g.*, A-66 (Cal.); A-67 (Colo.); A-2 (Conn.); A-27 (Kan.); A-23 (Ind.); A-8 (Mass.); A-31 (Mich.); A-10 (N.J.); A-18 (N.Y.); A-49 (N.Car.); A-37 (Ohio); A-50-51 (S.Car.); A-56 (Tex.); A-73 (Utah); A-22 (Vt.); A-43 (Wis.) ("separating them from society"); A-77-78 (U.S.).
30. *E.g.*, A-22 (Ill.); A-69 (Mont.); A-34 (Neb.); A-37 (Ohio); A-71 (Ore.); A-20 (Pa.).
31. A-11 (N.J.)
32. A-62 (Ariz.)
33. A-62 (Cal.); *see* A-1 (Conn.); A-35 (N. Dak.)
34. A-8 (Mass.); A-33 (Mo.); A-10 (N.J.); A-19 (Pa.); A-56 (Tex.); A-77 (U.S.).
35. A-59 (Va.); *see* A-67 (Colo.) (to be "kept in an institution indefinitely"); A-71 (Ore.) "indeterminate detention").
36. A-43 (Wis.).
37. A-46 (Ga.).

and it was felt especially important to keep them "away from thickly settled communities,"[39] "remote from the centers of population for reasons that are obvious."[40] Retarded persons simply did not have the "rights and liberties of normal people."[41] The Executive Secretary of the District of Columbia Board of Charity urged a congressional committee to authorize the erection of an institution since retarded people are "not much above the animal."[42] State officials elsewhere also sought to remove retarded people from the realm of humanity, referring to them as "not far removed from the brute."[43] They were not quite persons, but "by-products of unfinished humanity."[44]

Retarded people were segregated for being a "nuisance to the community,"[45] or a "menace to the happiness . . . of others in the community,"[46] or a "menace to society,"[47] or "for the welfare of the community"[48] or "of society,"[49] or so that "the state at large [may be] relieved from the heavy economic and moral losses arising by reason of their existence."[50] It was important to find a "way of getting rid of these kinds of cases."[51]

Official reports labeled retarded people "a parasitic, predatory class,"[52] a "danger to the race,"[53] "a blight and a misfortune both to themselves and to the public,"[54] whose role "in discount-

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38. A-67 (Colo.).
39. A-79 (U.S.).
40. A-2 (Conn.).
41. A-41 (S.Dak.).
42. A-80.
43. A-58 (Va.).
44. A-53 (Tex.).
45. A-22 (Ind.).
46. A-44 (Ala.); A-46 (Ga.); A-47 (Miss.); A-51 (Tenn.); A-60-61 (W.Va.).
47. A-68-69 (Idaho); A-43 (Wis.); A-72 (Utah) ("a social menace").
48. A-62 (Ariz.); A-22 (Ill.); A-47 (La.); A-70 (N.Mex.); A-80-81 (U.S.).
49. A-35 (Neb.).
50. A-45 (Fla.); *accord*, A-55-56 (Tex.).
51. A-3 (Conn.); *see* A-68 (Hawaii) ("a place to get the feeble-minded out of the community").
52. A-8 (Mass.); A-21 (Vt.).
53. A-43 (Wis.).
54. A-27 (Kan.).

ing social progress is by far the most potent influence for evil under which society is struggling today."[55]

The states actively inculcated fear of retarded persons, directed their identification and removal from the community, and enlisted assistance of the public to do so. Government officials undertook major outreach efforts.[56] Physicians, teachers, and social workers were required by law in some states to report to the government all persons "believed by them to be feeble minded."[57] Other states made it "one of the special duties of every health officer and of every public health nurse to institute proceedings to secure the proper segregation and custody of feebleminded persons."[58] Those states with no formal reporting or registration requirement at least officially encouraged health, welfare, and social workers to be "constantly on the lookout"[59] for potential cases to be institutionalized, and authorized a wide variety of public and private persons[60] —or sometimes simply "any reputable citizen"[61]—to institutionalize a person if a parent or relative "either neglect[ed] or refus[ed]" to do so.[62] Washington state legislators dispensed with that procedure and simply made it a criminal offense, punishable by a $200 fine, for any parents refusing to perform their "duty" to segregate in the state institution their "feebleminded" son or daughter.[63] Some states even permitted detention temporarily with no procedural rights for those who were "suspected of being feebleminded or idiotic."[64] Once parents placed their child in an institution, some states required them to "waive all right to remove such inmate there-

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55. A-24 (Ind.).

56. *E.g.*, A-62-63, 65-66 (Cal.); A-25 (Ind.); A-56 (Tex.).

57. A-40 (S.Dak.); *see also* A-71 (Ore.).

58. A-29 (Ky.); *accord*, A-52 (Tenn.).

59. A-28 (Kan.).

60. *E.g.*, A-66 (Cal.) ("any peace officer"); A-49 (N. Car.) ("ministers, teachers, or physicians); A-50-(Okla.) ("trustees of any township"); A-21 (Vt.) (the "selectman of [any] town"); A-75 (Wyo.) (the county prosecutor).

61. A-5 (Del.); A-22 (Ill.); A-46 (La.); A-51 (Tenn.); A-61 (W.Va.).

62. A-47-48 (Miss.); A-51 (Tenn.); A-61 (W.Va.); *see* A-44 (Ala.) ("notwithstanding the family or relatives may object thereto"); A-50 (Okla.).

63. A-74.

64. *E.g.*, A-36 (N.Dak.).

after either permanently or for a limited time."[65] All of these steps, and others, were thought necessary to segregate those "whose parents or guardians are averse to such actions."[66] Government officials made the judgment that "the presence of the unfortunate child in the home"[67] was "more tragic than any known disease,"[68] and a "menace to . . . the family."[69]

The regime of segregation reached to and was reinforced by systematic exclusion from public schooling,[70] forced sterilization,[71] peonage,[72] bans upon marriage and exercise of the franchise,[73] and even reached to the death of "defective" babies.[74]

Where did it all come from? Previously, in the mid-19th century, Dr. Samuel Gridley Howe and others had established residential schools for retarded people, all small, in or near the towns, with the purpose that retarded children should attend, learn, and return after a little while to their homes to live and to work. Howe insisted that the schools should not become custodial and warned against life-long segregation.[75] By the turn into

65. A-30 (Mich.); A-11 (N.J.); *accord*, A-69 (Mont.); A-36 (N.Dak.).

66. A-66 (Cal.); *accord*, A-34 (Neb.) (need for retarded people to be "detained in the institution against the desire of the parent").

67. A-21 (R.I.).

68. A-73 (Utah).

69. A-63 (Cal.); A-6 (Md.).

70. The history of exclusion from the schools is noted in *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F.Supp. 279, 294-95 (E.D. Pa. 1972); *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176, 191(1982); and committee reports on the Education of All Handicapped Children's Act, *e.g.*, S. REP. No. 94-168, 94th Cong., 1st sess. 9 (1975).

71. *E.g.*, A-63-64 (Cal.); A-26 (Iowa); A-5 (Me.); A-59-60 (Va.).

72. *E.g.*, A-3,4 (Conn.); A-81 (D.C.). Indiana required by law that "the labor in constructing" all of the institution's "buildings, improvements, and facilities shall be supplied as far as possible by the persons committed to the institution." A-24.

73. *See* Brief of Amici AAMD, *et al.*; Wald, *Basic Personal and Civil Rights* in PRESIDENTS COMMITTEE ON MENTAL RETARDATION, THE MENTALLY RETARDED CITIZEN AND THE LAW 3, 7-9, 25 (M. Kindred, *et al.*, eds. 1976).

74. *Defective Babe Dies As Decreed: Physician, Refusing Saving Operation, Defends Course as Wisest for Country's Good, Watches as Imbecile Child's Life Wanes*, N.Y. Times, Nov. 18, 1915, at 1, col. 3.

75. For Howe's position, see pp. A-6-7.

the new century, however, the times had changed. In 1903 Walter Fernald, a Massachusetts official and a leading figure in the Association of Medical Officers of American Institutions for Idiotic and Feeble-Minded Persons, dismissed Howe's view, saying:

> "[T]he Doctor wrote before the tide of immigration had set so strongly to our shores. . . . What is to be done with the feeble-minded progeny of the foreign hordes that have settled and are settling among us?"[76]

A solution equal to the severity and the magnitude of the problem was imperative. In 1913-14, at the request of the United States Public Health Service, Henry H. Goddard — the acclaimed author of *The Kallikak Family* [77] — administered Binet's IQ test to the southern and eastern European immigrants arriving in steerage at Ellis Island. "[G]iv[ing] the immigrant the

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76. P. TYOR. SEGREGATION OR SURGERY: THE MENTALLY RETARDED IN AMERICA, 1850-1920, at 160 (Diss. Nw. Univ. 1972), *published in* P. TYOR & L. BELL, CARING FOR THE RETARDED IN AMERICA: A HISTORY (1984). The standard historical works on America's treatment of retarded people include P. TYOR, *supra*; S. B. SARASON & J. DORIS, PSYCHOLOGICAL PROBLEMS IN MENTAL DEFICIENCY, chs. 12-16 (4th rev. ed. 1969), and EDUCATIONAL HANDICAP, PUBLIC POLICY AND SOCIAL HISTORY (1979); *see also* Appendix D to this Brief.

77. THE KALLIKAK FAMILY (MacMillan, 1912). Asking "What is to be done?" *The Kallikak Family* concludes:

> ". . . For the low-grade idiot, the loathsome unfortunate that may be seen in some of our institutions, some have proposed the lethal chambers. But humanity is steadily tending away from the possibility of that method. . . . "We cannot successfully cope . . . until we recognize feeble-mindedness and its hereditary nature, recognize it early, and take care of it.
>
> "[S]egregation through colonization seems in the present state of our knowledge to be the ideal and perfectly satisfactory method."

Id. at 101, 116-117. The leading standard historical works describing the pervasive place of eugenics in the era and its decisive role in action against immigrants, blacks and retarded people include M. H. HALLER, EUGENICS: HEREDITARIAN ATTITUDES IN AMERICAN THOUGHT (1963); K. M. LUDMERER, GENETICS AND AMERICAN SOCIETY: A HISTORICAL APPRAISAL (1972); L. KAMIN, THE SCIENCE AND POLITICS OF I.Q. (1974); Kevles, *Annals of Eugenics*, NEW YORKER Oct. 8, 1984, at 99-115; *id.* Oct. 15, 1984, at 99-125; *id.* Oct. 22, 1984, at 92, 93.

benefit of every doubt," he found that 79% of the Italians, 80% of the Hungarians, 83% of the Jews and 87% of the Russians were feeble-minded.[78]

This was — as Kenneth M. Stampp writes in his historiographical analysis of this early 20th Century era — "a time when xenophobia had become almost a national disease." It was a time "when Negroes and immigrants were being lumped together in the category of unassimilable aliens." During the first decades of the century,

> "the new immigrant groups had become the victims of cruel racial stereotypes. Taken collectively it would appear that they were, among other things, innately inferior to the Anglo-Saxons in their intellectual and physical traits, dirty and immoral in their habits, inclined toward criminality, receptive to dangerous political beliefs and shiftless and irresponsible. In due time, those who repeated these stereotypes awoke to the realization that what they were saying was not really very original — that, as a matter of fact, these generalizations were *precisely* the ones southern men had been making about Negroes for years."[79]

And the solution for the now apprehended "common problem" was, in the new decades of a new century, precisely similar: state-imposed segregation alike of "the Negro" and of retarded people.

The animus that supported segregation of "the feeble-minded" bore unmistakable similarity to the animus that evoked Jim Crow. *Compare* titles like *The Menace of the Fee-*

78. Goddard, *Mental Testing and the Immigrants*, 2 J. DELINQUENCY 243, 249, 252 (1917). Additional "findings" were extensively reported, *e.g.*, N.Y. Times, Jan. 13, 1913, at 10 ("*Alien Defectives*"); *see* A-12-16, 64-65.

79. K. M. STAMPP, *The Tragic Legend of Reconstruction*, the introduction in ERA OF RECONSTRUCTION 19-20 (1965) (Stampp's emphasis).

The standard historical works on the response of the era to immigration, describing its crucial contribution to the adoption of Jim Crow and its identification of new immigrants as so fearfully subhuman as to require state action, include T. J. ARCHDEACON, BECOMING AMERICAN: AN ETHNIC HISTORY 158-172 (1983); J. HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925, at 131-175 (1978); O. HANDLIN, THE UPROOTED 247-267 (2d ed. 1973); *see also* J. S. HALLER, OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859-1900, at 170-175 (1971).

bleminded in Connecticut (1915) *with* such popular southern works advancing Jim Crow as *"The Negro a Beast": Or "In the Image of God"* (1900); *The Negro: A Menace to American Civilization* (1907). They were, alike, "a part of the then current literature of the 'Yellow Peril' school and the flourishing cult of Nordicism."[80]

Champions of life-long segregation for retarded people explicitly invoked the then-exploding prejudice against black people. For example, in 1903, Martin W. Barr, President of the American Association of Medical Officers for Institutions for Idiotic and Feeble-Minded Persons, addressed the virtues of "life-long custodial service" in retardation institutions in these terms:

> "[T]hey partake of the industrial and manual training given in the antebellum days on the plantation, which were in fact — as the world is fast acknowledging — training schools for a backward race, many of whom were feeble-minded."[81]

The recitations of the arguments supporting life-long institutional segregation of retarded people matched the recitations on behalf of Jim Crow: "the shibboleths of . . . the Negro's innate inferiority, shiftlessness, and hopeless unfitness for full participation in the white man's civilization"; invocation of "the su-

80. C. V. WOODWARD, THE STRANGE CAREER OF JIM CROW 94 (3d rev. ed. 1974). Other standard historical works on Jim Crow include J. H. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS (5th ed. 1980); R. KLUGER, SIMPLE JUSTICE (1975); I. A. NEWBY, JIM CROW'S DEFENSE: ANTI-NEGRO THOUGHT IN AMERICA 1900-1930 (1965); G. M. FREDERICKSON, THE BLACK IMAGE IN THE WHITE MIND (1971).

81. Barr, *State Care of the Feebleminded*, 76 N.Y. MED. J. 1159 (1903). *Compare* the 1900 address of the President of the Southern Education Association on behalf of Jim Crow, *quoted in* C. V. WOODWARD, *supra* note 80, at 95.

Champions of Jim Crow invoked the stereotypes of feeblemindedness against black people. For example, Henry Fairfield Osborn, leading paleontologist and President of the American Museum of Natural History from 1908 to 1933, wrote that the intelligence of "the Negro" rarely exceeded "that of the eleven-year-old youth of the species Homo sapiens"; A. B. Hart wrote, "the Negro mind ceases to develop after adolescence." Osborn, *The Evolution of Human Races*, 26 NAT. HIST. 3 (1926); A. B. HART, THE SOUTHERN SOUTH 104 (1910).

preme law of self preservation"; and the necessity of "the stronger and cleverer race, free to impose its will upon new caught, sullen peoples."[82] William Graham Sumners' 1907 *Folkways* was seized upon to establish "the irremedial backwardness of the negro and the futility of efforts to improve him."[83]

Asserted dangerousness was crucial to the arguments for permanent segregation. For Jim Crow, "a sensational press played up and headlined current stories of Negro crime . . ., a daily barrage of Negro atrocity stories."[84] For life-long segregation of retarded people, the fiction of their dangerousness was also systematically invented and perpetuated. In Texas, for example, in 1914, the State Conference on Charities and Corrections was told by one of its leaders:

> "The refusal of Texas to make provision for its feeble-minded for the simple reason that from them they fear no personal bodily violence is an increasing menace to the mental and spiritual life of our State, in contrast to which the fancied physical safety is negligible. I have used the phrase fancied physical safety, advisedly, for security from bodily ills is not gained through segregation of the insane and promiscuous freedom of the feeble-minded. . . . Not only are the feeble-minded a menace as regards actual criminal proclivities but they are equally a menace as regards public health. [85]

The Jim Crow movement proceeded in "mounting stages of aggression" until, by 1911 " '[i]ts spirit is that of an all-absorbing autocracy of race, an animus of aggrandizement which makes, in the imagination of the white man, an absolute identification of

82. C. V. WOODWARD, *supra* note 80, at 70, 72-73.

83. R. KLUGER, *supra* note 80, at 86.

84. C. V. WOODWARD, *supra* note 80, at 86.

85. PROCEEDINGS (1914), *supra* note 10, at 63. The General Secretary of the National Conference on Charities and Corrections had in 1899 set the National Conference on a campaign to persuade the public that "the feeble-minded" were dangerous. Johnson, *Report of the Committee on Colonies for Segregation of Defectives*, 30 PROC. NATL CONF. CHARITIES & CORRECTIONS 248–49 (1903), *quoted in* P. TYOR, *supra* note 76, at 184; *see also* Barr, *The Imbecile and Epileptic Versus the Taxpayer and the Community*, 29 PROC. NATL CONF. CHARITIES & CORRECTIONS 163 (1902).

the stronger race with the very being of the state.' "[86] As Richard Kluger has written:

> "Keeping blacks separate, everyone understood, would prevent contamination of white blood by the defective genes of colored people, whose unfortunate traits stemmed from their tribal origins in densest Africa and were incurably fixed upon the face from generation to generation. . . . [T]heir very blackness bespoke their low and brutish nature. All literature, folklore, and custom of the English-speaking peoples reinforced the notion that the African's tawny hide was a primal stain."[87]

The apotheosis of the demands of racial purity was, as the State of Kentucky represented to this Court in its brief in *Berea College v. Kentucky*, 211 U.S. 45 (1908):

> "If the progress, advancement and civilization of the twentieth century is to go forward, then it must be left not only to the unadulterated blood of the Anglo-Saxon-Caucasian race, but to the highest types and geniuses of that race. . . ."[88]

The demands of "racial betterment" required the very most severe measures within their grasp. Solutions beyond segregation were examined but had to be discarded. The Texas pamphlet was illustrative: ". . . euthanasia, neo-malthusianism, and polygamy are either impossible under the protective forces of modern social conditions or are ideas repugnant to present day ideas of religion and humanity." *Segregation* "has appealed to society's feelings of humanity and fair play with greatest force." *Segregation* is "the most feasible, most easily put into force, and *least subversive of constitutional prerogative*"[89] — a plain statement of the impact on the Era of *Plessy v. Ferguson*, 163 U.S. 537, 544-52 (1896). Without *Plessy's* permission, no state in contemplation of the Fourteenth Amendment could have dared to impose life-long segregation upon any citizen.

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86. C. V. WOODWARD, *supra* note 80, at 108.

87. R. KLUGER, *supra* note 80, at 305.

88. *Id.* at 87.

State-imposed segregation was justified as benign and even beneficial to its victims according to the near constant professions of those who established it. Segregation of "the feebleminded," the Texas rationale went, consistent with a "deep and abiding charity," "permits all to live under those circumstances best suited to make each useful and happy."[90] As to segregation by race, a Texan wrote, "both races believe that a separate social life is most desirable and most practical."[91] Jim Crow in Texas was not "petty persecution of the Negro, attributed to a desire to humiliate, stigmatise, and degrade him, [it is] the embodiment of enlightened public policy, and is the surest guarantee of a minimum of friction between the races."[92] Separation, President Woodrow Wilson said, was "not humiliating, but a benefit . . . 'rendering them more safe in their possession of office and less likely to be discriminated against.' "[93]

The Cleburne ordinance excluding "homes for the . . . feebleminded" is thus not an isolated enactment but the perpetuation of a pattern of invidious inflictions.[94] Indeed, the legislation from which Cleburne's exclusionary provision is copied — Dallas' ordinance of 1929[95] — was formulated in the era that established the state regime for the life-long segregation of retarded people.

This case will determine whether that regime of segregation will be disestablished and whether a decent respect will be ex-

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90. *Id.* at 83.

91. R. E. SMITH, CHRISTIANITY AND THE RACE PROBLEM 10 (1922).

92. A. H. STONE, STUDIES IN THE AMERICAN RACE PROBLEM 64 (1908).

93. R. KLUGER, *supra* note 80, at 91.

94. Amici had available to them, in the library of the University of Texas at Austin, current zoning ordinances of sixty Texas cities. Of these, the codes of twelve cities explicitly exclude homes for persons with retardation from neighborhoods where comparable dwellings for non-retarded persons are permitted. They are AMARILLO CODE, chs. 26-8, 26-11(43a); BEAUMONT CODE, §42-15(A)(1); CARROLLTON CODE, art. XV(14); COPPERAS COVE CODE, §5(40(m); DUNCANVILLE CODE, art. III(14); EDINBURG CODE, art. IV, §4-2(3); KILLEEN CODE, ch. 9, art. 2, §8-10; MIDLAND CODE, §11-1-10(A); NEW BRAUNFELS CODE, §6C.1-6; PORT NECHES CODE, §24-6; SAN ANGELO CODE, §33-2-14(6); SULPHUR SPRINGS CODE, art.6(a).

95. The ordinances are set out in ADD. B.

tended to retarded people. Disestablishing that regime requires the full measure of equal protection lest retarded people be again treated as "unfit for citizenship."[96]

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96. 1920 Miss. Laws 288, set out at p. A-47.